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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NOS. 357 AND 358

CIRACO MANEJA, *et al.*,
Petitioners,

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Respondent.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner,

v.

CIRACO MANEJA, *et al.*,
Respondents.

BRIEF FOR WAIALUA AGRICULTURAL COMPANY, LIMITED.

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(ii) Hauling sugar cane produced by Waialua from the fields to the mill;

(iii) Grinding such sugar cane at the mill into raw sugar and molasses;

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BRIEF FOR WAIALUA AGRICULTURAL COMPANY, LIMITED.

Pursuant to Stipulation of the parties filed and approved on November 23, 1954, this brief covers the questions presented in both No. 357 and No. 358.

OPINIONS BELOW.

The opinion of the District Court (R. 748-822) is reported in 97 F. Supp. 198 and also in 10 WH Cases 287 and 20 Labor Cases ¶ 66,531.[1] The opinion of the Court of Appeals (R. 725-746) is reported in 216 F. (2d) 466 and also in 12 WH Cases 172 and 25 Labor Cases ¶ 68,404. The

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[1] The opinion also incorporated findings of fact and conclusions of law set forth at R. 190-307 and 308-320.

opinion of the Court of Appeals on petition for rehearing by Waialua Agricultural Company, Limited (hereinafter called Waialua) is reported in 216 F. (2d) 479 and also in 12 WH Cases 254 and 26 Labor Cases ¶ 68,645 (R. 746-747). The opinion of the Court of Appeals in a prior proceeding (R. 822-842) is reported in 178 F. (2d) 603.

JURISDICTION.

The judgment of the Court of Appeals herein was dated and entered on May 5, 1954 (R. 746). Waialua filed a timely petition for rehearing on June 2, 1954, which was denied by order dated and entered on June 24, 1954 (R. 747). On July 13, 1954, Mr. Justice Black entered an order extending until September 22, 1954 the time within which Ciraco Mareja *et al.* (hereinafter called the employees) might file a petition for certiorari (R. 843). The employees and Waialua separately filed petitions for certiorari (Nos. 357 and 358) on September 20, 1954. This Court granted both petitions on November 8, 1954 and consolidated the cases for argument (R. 843-844). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

These cases arise under the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. § 201 *et seq.*), hereinafter called the "Act". The pertinent provisions of the Act are as follows:

Section 3(b) defines "commerce" to mean—

> ". . . trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof".[2]

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[2] The Fair Labor Standards Amendments of 1949 (63 Stat. 910), effective January 25, 1950, made certain changes in Sections 3(b) and 3(j). No issue is presented herein under the 1949 Amendments, however, since this proceeding is solely concerned with application of the Act to the employees in specified workweeks in 1946 and 1947. *Infra*, pp. 8, 11-12.

Section 3(c) defines "State" to mean—

> ". . . any State of the United States or the District of Columbia or any Territory or possession of the United States".

Section 3(j) defines "produced" to mean—

> ". . . produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State".

Section 7(a) provides that no employer shall employ any of his employees "who is engaged in commerce or in the production of goods for commerce" for a workweek longer than 40 hours—

> ". . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed".

Section 13(a)(6) exempts from both the wage and hour provisions of the Act "any employee employed in agriculture . . ." Section 3(f) defines "agriculture" to include—

> ". . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, in-

cluding preparation for market, delivery to storage or to market or to carriers for transportation to market."

Section 7(c) provides that —

"In the case of an employer engaged . . . in the processing of . . . sugarcane . . . into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) [the overtime provisions of the Act] shall not apply to his employees in any place of employment where he is so engaged . . ."

Section 16(b) (as amended by Section 5(a) of the Portal to Portal Act of May 14, 1947, 61 Stat. 87), provides that —

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action".

Also involved is Section 2201 of Title 28, United States Code, which provides:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

QUESTIONS PRESENTED.

In No. 358.

1. Whether the District Court abused its discretion in entertaining Waialua's declaratory judgment suit to resolve and terminate the long-standing controversy between the parties as to the application of the Fair Labor Standards Act to the employees, who were employed by Waialua in enumerated tasks [3] during specified workweeks in 1946-1947 and who had counterclaimed under Section 16(b) of the Act for overtime compensation and damages allegedly due for such workweeks.

2. Whether the Court of Appeals erred in reversing the District Court and in ordering dismissal of Waialua's declaratory judgment suit on the ground of alleged absence of a "case or controversy", in that the parties were in "apparent collusion" because they stipulated all material facts and separately failed to contest the constitutionality of the Act as applied to agricultural employment, where the actual controversy between the parties involved the application of certain statutory exemptions on undisputed facts and where the constitutional issue was insubstantial as shown by prior decisions of this Court.

In No. 357.

3. Whether the employees were exempt from the overtime provisions of the Act by virtue of Sections 13(a)(6) or 7(c) during all or any of specified workweeks in 1946-1947, while engaged in hauling, processing of sugar cane

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[3] See Appendix A, *infra*, pp. 87-89, for a detailed summary of the various tasks performed by each employee here involved.

grown on the plantation, repairing equipment used in such operations, and in other enumerated tasks listed in Appendix A, *infra*, pp. 87-89.

4. Whether the employees were engaged in interstate commerce or in the production of goods for interstate commerce, when they were employed in repairing and maintaining Waialua's dwelling houses located on Waialua's plantation, and in furnishing, maintaining, repairing or servicing related domestic services or facilities to or for the lessees of such dwelling houses, who included both employee of Waialua and others; and if so engaged, whether such employees were nevertheless exempt from the overtime provisions of the Act by virtue of Section 13(a)(6).

5. If during the same workweek an employee engaged in activities exempt under Section 13(a)(6) or Section 7(c) of the Act and did not engage for a substantial part of his time in the same workweek in an activity not so exempt, whether he was exempt for that workweek from the overtime provisions of the Act by virtue of Section 13(a)(6) or Section 7(c).

STATEMENT OF THE CASE.

A. PROCEDURAL BACKGROUND.

1. Proceedings in Previous Appeal.

In April 1947 a predecessor corporation to Waialua[4] instituted a class action for declaratory relief in the United States District Court for the District of Hawaii, pursuant to Federal Rule 23(a) and Sections 24 and 274d of the Judicial Code (now 28 U. S. C. §§ 1337, 2201). The defendants named in that original complaint were employees of Waialua, a union which was the collective bargaining representative of the employees, and an official of that union. Waialua prayed in that action for a declaratory judgment to resolve the controversy between the parties

[4] Waialua was later duly substituted for said predecessor corporation (R. 751).

as to application of the overtime provisions of the Act to the employee defendants and all its other employees similarly situated. Waialua at that time was threatened with a multiplicity of suits under Section 16(b) of the Act, both in Federal and Territorial courts, for liquidated damages as well as unpaid overtime compensation (R. 12-13, 16). The defendants filed a counterclaim under Section 16(b) of the Act, to recover unpaid overtime compensation for work performed by the employee defendants and to recover liquidated damages, costs and attorney's fees. The District Court ordered a separate trial of the counterclaim, to take place subsequent to determination of the issues presented by the declaratory judgment suit.

Following trial of the action for declaratory judgment, the District Court entered judgment on the merits, partly for defendants and partly for Waialua. 77 F. Supp. 480. Both parties appealed to the United States Court of Appeals for the Ninth Circuit, which reversed and remanded (R. 822-842). The Court of Appeals stated that the judgment of the District Court was "a nullity" because, in the Court's view, it gave "no mandate or command" as to the employee defendants and therefore did not declare their rights with the positiveness required of a judgment; and because the judgment was deemed unsupported by sufficiently detailed and specific findings of fact (R. 825-827, 829, 837). The Court of Appeals also criticized the class representation aspects of the action, the joinder of the union and a union official as parties defendant, the stipulation of all facts, the failure to place time limits on the scope of the action, and the failure to adduce testimony by any employee defendant (R. 837-840). The Court of Appeals concluded:

> "Refusal to entertain a petition for declaratory judgment is peculiarly within the discretion of the Trial Court. If a 'concrete set of facts' would be supplied to which the statute could be fitted and thereby 'an adequate and effective judgment' rendered, it would be proper to proceed. For such a judgment

would satisfy the necessity of firmly founded fact findings and the elements requisite for a plea of res judicata in subsequent litigation . . . However, we leave this as a suggestion only and not as a direction . . .

". . . The cause is therefore remanded for further proceedings in accordance with this opinion, either for dismissal for the reason that no ground has been shown for entry of a declaratory judgment or to permit the entry of detailed findings as to each employee defendant, based upon an adequate record." (R. 841, 842).

This Court denied certiorari on petition by Waialua. 339 U. S. 920.

2. Proceedings in Present Appeal.

After remand, Waialua amended its bill of complaint, in response to the criticisms of the Court of Appeals, by eliminating the class representation aspects of the suit, and by omitting as parties defendant the union, the union official, and certain employees (R. 4-5). The amended complaint was filed against 42 named individuals who were employed on Waialua's plantation during workweeks from November 20, 1946 through September 14, 1947; and prayed for a declaratory judgment to resolve Waialua's prolonged and continuing controversy with each of the defendants as to the application of the overtime provisions of the Act to his specified activities in the aforesaid workweeks (R. 6-14). Waialua invoked the jurisdiction of the District Court under § 24 and § 274d of the Judicial Code as amended (now 28 U. S. C. §§ 1337, 2201), and contended in substance that all the defendants were exempt from the wage and overtime provisions of the Act during the workweeks involved by reason of the exemptions under Sections 13(a)(6) and 7(c) (R. 11-12, 13-14). Defendants filed their "Answer to Amended Complaint, and Counter-Claim, Cross-Claim, and Cross-Complaint", which continued to set up their alleged action under Section 16(b) of the Act for alleged unpaid overtime compensation, liquidated dam-

ages, costs and attorney's fees (R. 16, 18-19, 24-26).[5] The averments of the counterclaim were put in issue by Waialua's "Reply and Answer to Counter-Claim, Cross-Claim, and Cross-Complaint" (R. 20-24).

The District Court entered an order under Federal Rule 42(a) requiring that all claims and issues presented in both suit and counterclaim be heard and tried jointly (R. 5-6, 750). Upon the joint trial, a precise record was adduced showing with respect to each employee the particular workweeks worked by him during the period covered by the litigation; the number of hours worked by him in each such workweek; his compensation in each such workweek, including the amount of overtime compensation paid him and the number of hours for which such overtime compensation was paid; and the duties performed by him in each such workweek. Furthermore, while all material facts were set forth in a lengthy Stipulation of the parties,[6] 22 of the 42 defendants testified orally, and all supported the truth and accuracy of the Stipulation except in certain minor respects (*e.g.*, R. 409-410, 423-424, 434-435, 446-447, 458-459; see also R. 615-617, 619, 620-621). In such minor respects the Stipulation was thereafter amended by the parties to conform with the oral testimony.[7] Thereafter, the parties briefed and argued their opposing interpretations of the statutory provisions involved.

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[5] The counterclaim stated that it was asserted under the Fair Labor Standards Act (R. 18). The District Court stated that the counterclaim was filed under Section 16(b) of the Act (R. 749-750). The allegations of the counterclaim and the prayer therein clearly establish it is an action under Section 16(b) of the Act. Indeed, the employees filed for the record the signed consents and authorizations to become parties to the litigation which are uniquely required by Section 16(b). See pp. 31a to 31pp of the original transcript of record herein, certified by the Court of Appeals under Rule 21(1) (hereinafter called the Certified Transcript).

[6] See pp. 32 to 864 of the Certified Transcript.

[7] See amendment to Stipulation filed September 5, 1950, pp. 2026-2031 of the Certified Transcript. See also R. 618-619.

The District Court entered detailed findings of fact and conclusions of law with respect to all claims and issues presented in the trial of the consolidated actions (R. 190 *et seq.*, 308 *et seq.*). Such findings and conclusions showed as to each employee, in each of the workweeks in controversy, a detailed description of the work performed by him, the number of hours worked by him, his regular hourly rate of pay, whether he had received overtime compensation for hours of work in excess of 40, whether he was held exempt under Section 13(a)(6) or Section 7(c), and the amount of unpaid overtime compensation, if any, which the court found to be due and owing. The District Court thereafter entered a single judgment (R. 321 *et seq.*) entitled "Declaratory Judgment and Judgment Awarding Defendants Overtime Compensation, Liquidated Damages, Costs, and Attorney's Fees". The Judgment was divided into two parts. Part I was called "Declaratory Judgment" (R. 322) and Part II was entitled "Judgment Awarding Defendants Overtime Compensation, Liquidated Damages, Costs, and Attorneys' Fees" (R. 336). Thus the District Court's judgment disposed of all claims and issues raised in Waialua's suit for declaratory judgment and in the employees' counterclaim under Section 16(b) of the Act.

The Court of Appeals, while recognizing that its earlier instructions and suggestions had been followed on remand (R. 727-728, 731), nevertheless reversed the judgment of the District Court for "error in approach" (R. 726), holding that the parties were in apparent collusion because they had stipulated all material facts and because neither had contested the constitutional validity of the Act under the commerce clause as applied to the agricultural employment of the employees here involved (R. 726, 728, 734, 736, 742, 743, 747). The Court of Appeals thereupon directed that "the proceeding be dismissed for abuse of discretion in entertaining a petition for declaratory judgment here and attempting to settle a question of jurisdictional and constitutional construction therein" (R. 740-741). The

Court of Appeals then filed its judgment providing that "the judgment of the said District Court in this cause be, and hereby is reversed for proceedings in accordance with the opinion of this court" (R. 746).

On June 2, 1954 Waialua filed in the Court of Appeals its petition for rehearing, praying that the opinion and judgment be modified to clarify the Court's disposition of the counterclaim in relation to the dismissal of the suit for declaratory judgment. On June 24, 1954 the Court of Appeals denied the petition for rehearing. Its memorandum opinion stated that, "The Court construes what is called the cross-complaint as a petition also for declaratory relief. This is left undismissed by this Court". As to further proceedings therein, however, the Court's opinion stated that, "The parties and the Trial Court . . . should be mindful of the fact that this Court has held that the entire cause was tainted by apparent collusion between the parties in the attempt to obtain an advisory opinion upon constitutional questions" (R. 747).

B. FACTUAL BACKGROUND.

All material facts are set forth in a lengthy Stipulation of the parties.[8] Waialua operates a sugar plantation on the Island of Oahu, Territory of Hawaii. Since 1898 it has been engaged almost exclusively in growing, cultivating and harvesting sugar cane on land owned or leased by it (R. 31), and in processing such sugar cane into raw sugar or molasses on the plantation where grown (R. 30, 31, 38-39, 721). The employees are 40 named individuals[9] who

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[8] The portion of the Stipulation containing an over-all description of Waialua's plantation and its operations is set forth in the record (R. 27-123, 129-178, 721-725). The entire Stipulation is set forth in the Certified Transcript. *Supra*, notes 6 and 7.

[9] The complaint in the District Court named 42 individuals as defendants, but two of these were held exempt from the Act during the period involved, and no appeal was taken from such holding (R. 308-310, 325, 339).

were employed by Waialua on its plantation between November 20, 1946 and September 14, 1947 (R. 9-10, 18, 123), performing various tasks summarized in Appendix A, *infra*, pp. 87-89.

Waialua processes no cane except that grown by itself on its plantation (R. 84). Neither Waialua nor any of its employees, including those here involved, engages in any sugar refining operations (R. 32). Substantially all the land (9,663 acres) now devoted to sugar cane production has been owned or leased and used by Waialua for this purpose since 1910 (R. 33).

On its plantation Waialua prepares and plows the fields for the planting of sugar cane; plants sugar cane; "ratoons" the fields;[10] cultivates sugar cane; applies fertilizer to the cane fields; irrigates cane fields by a network of irrigation ditches and water storage reservoirs; harvests sugar cane; maintains a network of field roads (which criss-cross the cane-growing land (R. 35)) for hauling employees, field supplies and equipment throughout the plantation by truck; and hauls sugar cane by a narrow-gauge railroad (which also criss-crosses the cane-growing land (R. 35)) from the fields where grown to Waialua's mill.[11] These integrated operations are more fully described in the Stipulation (R. 39-66).

Waialua's mill, located on its plantation (R. 38), grinds the sugar cane grown on its plantation into raw sugar and molasses. Waialua then loads the bagged raw sugar and molasses for shipment to the continental United States or stores such products temporarily in the sugar warehouse or

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[10] "Ratooning" refers to operations performed after a field is harvested to prepare it for the growing of another crop (R. 42).

[11] The parties have stipulated that the term "mill" means the building and equipment of Waialua used in the actual processing of sugar cane into raw sugar, including cane carrier, cane cleaning plant and scales, crushing plant, boiling house, fire room, power plant, sugar warehouse and molasses tanks, and all equipment therein (R. 31).

molasses tanks (R. 66-82, 84-85). Waialua's operations and the work of its employees are completed by loading the bagged raw sugar and the molasses into railroad cars owned and operated by an independent carrier at the site of the mill, and by pushing such cars from such site onto a nearby spur of the carrier (R. 31-32, 59).

Waialua has equipped and maintains complete service shops for prompt minor repairs and emergency work and major overhaul of field, hauling, and processing machinery, equipment and facilities indispensable to its growing, hauling and processing operations. These service repair shops are located on the plantation, in an area extending not more than 300 feet from the mill building proper (R. 94, 723).

The foregoing operations, and the employees' work therein, are highly integrated and interdependent. Sugar cane is very perishable and starts to deteriorate immediately after being cut. Consequently, it must move "continuously from field to crushing mill", there to be processed into raw sugar within a few hours after it is cut, so that it will not spoil (R. 33, 731). All of Waialua's cane-growing lands are operated as an integrated farming unit and single enterprise. Employees working in the fields move from one area to another, depending upon the program of plowing, planting, irrigating, fertilizing, harvesting, etc. Waialua's growing, harvesting and processing of cane and the marketing of the raw sugar constitute one continuou- and year-round operation (R. 35-36). Machinery breakdowns in the mill may result in a shutdown of the entire mill, which would necessitate a discontinuance of harvesting and hauling operations until mill repairs are complete. Breakdowns of harvesting machinery or of cane hauling facilities in turn may result in a shutdown of the entire mill (R. 94).

Waialua owns and maintains 820 dwelling houses, all of which are located on the plantation (R. 120). Waialua provides the occupants of such dwelling houses with various facilities and services, including firewood, water, electricity,

sewage disposal, street maintenance and cleaning, and recreational facilities (R. 118, 119). These dwelling houses are occupied by 3,373 persons, of whom 2,952 are employees and pensioners of Waialua and their families. The remaining 421 persons living in such houses are lessees and their families who are not employed by Waialua and who either work off the plantation or who own, operate or are employed by independently controlled businesses (R. 120-121). No employee, including any of those herein, is required as a condition of employment to live on the plantation or in plantation dwelling houses or to use any service or facility which Waialua furnishes or renders its employees (R. 120). The relationship between Waialua and its employees by virtue of the occupancy of such houses, including each employee herein, is that of landlord and tenant (R. 120).

Pursuant to the Territorial wage and hour law (*Revised Laws of Hawaii*, 1945, Title 9, Ch. 75, § 4354) and also pursuant to the applicable collective bargaining contract (R. 141, 143), Waialua paid overtime to all employees for hours worked by them in excess of 48 in a workweek. Therefore, the sole issue involved herein concerns the payment of overtime compensation to the employees only for hours in excess of 40 per week up to and including 48 (R. 745, note 42). No question of minimum wage payments is involved herein, since the lowest paid employee received an hourly rate substantially in excess of the 40¢ minimum required by the Act in 1946-1947, the period here in issue.[12] The hourly wage rates of the employees ranged from the 76¢ paid to employee Fernandez (R. 284) to $1.71 paid to em-

[12] Under the Sugar Act of 1937, as amended, 50 Stat. 909, 7 U. S. C. § 1131(c), the Secretary of Agriculture published a minimum of 42.4¢ per hour for Hawaiian sugar cane workers for 1946, based upon the actual wages paid such workers as averaged over the year. Since 1947, the Secretary's wage determinations have required the payment of wages agreed upon by the collective bargaining contracts between the plantations, including Waialua, and the union of the employees here involved. See *Agricultural, Manufacturing and Income Statistics for the Domestic Sugar Areas* (U. S. Department of Agriculture, 1954), p. 146.

ployee Tsutsui in the workweek commencing August 18, 1947 (R. 258).

In substance the District Court held:

1. Each employee was engaged in commerce or in the production of goods for commerce, within the meaning of Section 7(a) of the Act, during each workweek in issue (R. 322).

2. Of all the activities in issue (described in Appendix A, *infra*, pp. 87-89), the agriculture exemption in Section 13(a)(6) exempted the employees only while engaged in certain specified field activities, namely preparation of land for planting, planting, ratooning, cultivating, fertilizing, irrigating, and the harvesting operation only up to the point where cars loaded with cut cane were moved from the fields on portable track to the fixed line of Waialua's narrow gauge railroad (R. 191-192, 194, 196, 198, 201, 308-310, 789-790).

3. The processing exemption in Section 7(c) exempted only the employees working in the mill building while operating processing machinery, repairing such machinery either during the time the mill was operating or during the weekend shutdown, or bagging, loading and shipping raw sugar (R. 213, 310-318, 796-800).

4. If in any workweek an employee performed work which was exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or Section 7(c), the exemptions would be lost in that workweek if the employee also did any other work not so exempt, regardless of how insubstantial such other work was (R. 336).

The Court of Appeals disapproved as clearly erroneous many of the essential findings of fact by the District Court (*e.g.*, R. 726-727, 731-735, 742-743), and concluded that each employee was totally exempt from the Act under the agriculture exemption in Section 13(a)(6) in each workweek in issue (R. 726-727, 730-731, 732-735, 736, 739, 741 *et seq.*). The Court of Appeals accordingly did not deem

it necessary to consider the processing exemption under Section 7(c) (R. 746, note 45). However, the opinion and judgment of the Court of Appeals went off on jurisdictional and constitutional grounds. *Supra,* pp. 10-11.

SUMMARY OF ARGUMENT

In No. 358

I.

The District Court did not abuse its discretion in entertaining Waialua's declaratory judgment suit to resolve the controversy between the parties over the meaning of the Fair Labor Standards Act as applied to particular employees engaged in defined tasks during specified workweeks. The pleadings, Stipulation of the parties, and the pendency of the counterclaim herein for claimed overtime compensation, liquidated damages and counsel fees disclose an immediate and continuing controversy concerning the application of the Act. This Court has repeatedly approved application of declaratory judgment procedure to such controversies. *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local*, 321 U.S. 590, 592; *Jewell Ridge Coal Corp.* v. *Local #6167*, 325 U.S. 161. Dismissal of Waialua's suit by the Court of Appeals has nullified Waialua's earnest efforts since 1947, pursuant to the Judicial Code and the Federal Rules of Civil Procedure, to obtain a declaratory judgment that would conclusively terminate the controversy with petitioner-employees.

The Court of Appeals in its first review of the case in 1949 did not direct dismissal of the declaratory judgment suit, but remanded the cause for further proceedings including, as one suggested alternative, "entry of detailed findings as to each employee defendant, based upon an adequate record". No-where in its first opinion did the Court of Appeals imply that the action might be reversed upon the entirely new basis of alleged "collusion" advanced in its second opinion. In the second trial the

parties and the District Court meticulously complied with every requirement and suggestion of the Court of Appeals in its 1949 opinion, and manifestly satisfied established standards for declaratory relief. E.g., *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 239-242; *Altvater* v. *Freeman*, 319 U.S. 359, 363-366. The Court of Appeals accordingly erred in reversing the District Court for alleged abuse of discretion in entertaining Waialua's suit.

II.

Waialua's suit was not rendered collusive because the parties stipulated to most of the facts,—a practice favored by the Federal Rules (e.g., Rules 16, 36, 57) and frequently approved by this Court in litigation under the Act. *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 391; *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 725, 729. The Court of Appeals likewise erred in finding "apparent collusion" in the *bona fide* assumption by the respective parties below that the employees (except those engaged in mill village work) were engaged in the production of goods for interstate commerce. Contrary to the views expressed by the Court of Appeals, the production of agricultural commodities destined for interstate movement is manifestly within the constitutional power of Congress, *Mandeville Farms* v. *Sugar Co.*, 334 U.S. 219, 236-237, and within the commerce coverage of the Act, *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 759. Established practice and policy approve rather than condemn the parties' failure to raise insubstantial constitutional issues. *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U.S. 129, 136-137. Waialua's suit was thus properly founded upon the interpretation of the statutory exemptions under Sections 13(a)(6) and 7(c), to which the Court of Appeals should have addressed itself. The fact that this proceeding is decisive of similar problems affecting all Hawaiian sugar plantations (and large segments of continental agriculture) simply contributes to the

desirability and importance of declaratory relief as prayed by Waialua.

III.

Since the judgment of the Court of Appeals directed dismissal of Waialua's suit on erroneous jurisdictional and constitutional grounds, the judgment should be reversed, with appropriate directions.

SUMMARY OF ARGUMENT

In No. 357

The stipulated facts show that Waialua's operations, insofar as they constitute the production of goods, are confined to the growing of sugar cane and the processing of that cane into raw sugar and molasses in unified, synchronized, integrated operations on its own plantation. All such operations are exempt under the plain language of Section 13(a)(6) or Section 7(c) or both.

IV.

The Court of Appeals correctly concluded that the employees were exempt from the overtime provisions of the Act under Section 13(a)(6) because they were "employed in agriculture", as defined in Section 3(f), when engaged on Waialua's plantation in (i) hauling activities on the network of field roads and the narrow-gauge railroad tracks which criss-cross the cane growing fields; (ii) processing sugar cane grown on the plantation; (iii) repairing field implements, and also equipment used in hauling and processing operations; and (iv) other enumerated tasks listed in Appendix A, *infra*, pp. 87-89.

The statutory definition of "agriculture" in the Act is divided into two distinct branches. *Farmers Irrigation*

Co. v. *McComb*, 337 U.S. 755, 762-763. The first distinct branch—the primary meaning—is "farming in all its branches", illustrated by "the cultivation and tillage of the soil" and "the production, cultivation, growing, and harvesting of any agricultural . . . commodities". The second distinct branch of the agriculture definition—the broader meaning—includes "*practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations*", including "preparation for market, delivery to storage or to market or to carriers for transportation to market." *Farmers Irrigation Co.* v. *McComb, supra.* [Emphasis supplied]. Under the statutory language, such practices are exempt if they are either incident to *or* in conjunction with the farming operations; they do not have to be both.

Functionally, the various integrated activities of Waialua's employees represent common, everyday activities performed by many American farmers and farms. Waialua is obviously a "farmer" within the meaning of the "agriculture" exemption because it owns and operates a farm, on which it cultivates and tills the soil, producing, growing and harvesting sugar cane, an agricultural commodity. Waialua's employees, when engaged in these activities, clearly fall within the first distinct branch of the agriculture definition. The perishable nature of sugar cane requires that it be processed into raw sugar within a few hours after it is cut and within a few miles of where it is grown. Accordingly, the hauling, processing and other activities of Waialua—the grower of the sugar cane—constitute "practices . . . performed by a farmer . . . as an incident to or in conjunction with" the enumerated field operations performed by Waialua, and therefore come within the second branch of the agriculture definition. Further, such hauling, processing, etc. activities are all performed—except in minor and sporadic instances—on Waialua's farm, an integrated and contiguous area

on which Waialua cultivates, grows and harvests sugar cane, and for this additional reason such activities are within the second branch of the agriculture definition. Waialua processes only the sugar cane which it grows on its own farm. The processing of farm commodities is incidental to or in conjunction with the farming operation by which the commodities are produced. *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 766, note 15. Where, as here, such processing is done both by the farmer, and on a farm, on the commodities grown on that farm, it is incidental to or in conjunction with that farmer's operations. This is equally true of Waialua's hauling and other activities here involved.

In the *Farmers Irrigation* case, employees of a mutual irrigation company were held non-exempt under the first branch of the "agriculture" exemption because the Company was a separately organized corporate entity which owned no farms and raised no crops; and they were held non-exempt under the second branch because the irrigation work itself was not done on a farm or by farmers. Waialua's employees here involved, however, are employed on the farm by Waialua, a farmer, and their activities are all in conjunction with and incident to the integrated farming operations.

The legislative history of the agriculture exemption reinforces its comprehensive language. Beginning with a broad definition of agriculture in the original bill as reported to the Senate, Congress made the exemption more and more inclusive as the bill worked its way through to final passage. Congress clearly expressed the legislative purpose to exempt such processing operations as milk bottling, fruit packing, cotton ginning, hog slaughtering, and sugar cane grinding, when performed by the farmer upon his own produce. Congress underscored that intention by striking out limiting phrases such as "ordinarily" performed by a farmer and by adding sweeping language exempting all practices performed "in con-

junction with" as well as "incident to" farming operations, whether by a farmer or "on a farm", down to and including "preparation for market", "delivery to storage", and "delivery . . . to market or to carriers for transportation to market". Congress drew no distinction between large and small farms or between hand labor and mechanized farms. Congress legislated with full appreciation of the accelerating pace of technology in American agriculture. Repeatedly since the original enactment in 1938, Congress has declined to deny the exemption to so-called "mechanized" or "industrialized" agriculture, notwithstanding arguments presented on behalf of employees on Hawaiian sugar plantations by the union representing the employees here involved.

Moreover, the exemptions in Sections 7(c) and 13(a)(10), which were granted to non-farmer processors of agricultural commodities in order to spare the farmer additional costs, emphasize the Congressional intent to exempt operations by farmers themselves, as comprehensively defined in Section 3(f), where additional costs would be even more direct.

The decisions of the First Circuit relied upon by the employees (*Bowie* v. *Gonzalez*, 117 F. (2d) 11 and 123 F. (2d) 387; *Calaf v. Gonzalez*, 127 F. (2d) 934 and *Vives* v. *Serralles*, 145 F. (2d) 552) do not conflict with the conclusions of the Court of Appeals below that the employees fell within the agriculture exemption. The First Circuit holds that employees employed by sugar cane plantations are not exempt when they are hauling or processing sugar cane not grown by their own employer (see *Puerto Rico Tobacco Marketing Coop. Ass'n.* v. *McComb*, 181 F. (2d) 697, 701), but are exempt when they are hauling or processing sugar cane grown by their own employer on his own farm.

The original administrative interpretations of the United States Department of Labor uphold the exemption of all employees here involved. The Department partly changed

its position by announcing in 1941 that the exemption does not apply to sugar mill employees even though they grind only cane grown by the sugar mill owner in his own fields. Such change is not persuasive because it did not represent contemporaneous construction of a new statute; it was based upon an erroneous interpretation of *Bowie* v. *Gonzalez, supra;* and it was inconsistent with the continued exemption by the Department of the processing of other commodities, such as fruit packing and canning. Significantly, the Department has never sought to enforce the provisions of the Act with respect to employees of Waialua or any other sugar plantation in Hawaii when engaged in the activities here in question, but has always treated such employees as exempt.

V.

Assuming that any employees are held non-exempt under the agriculture exemption provided in Section 13(a)(6), such employees were exempt from overtime requirements by reason of the year-round exemption of sugar cane processing in Section 7(c) of the Act. While that section was not written into the Act for the purpose of exempting the farmer as such, nevertheless by its terms it applies as much to a farmer who processes his own crops as to a processor who processes the crops grown by others.

Section 7(c) imposes two requirements which are fully satisfied here. *First*, Waialua is engaged in "processing . . . sugar cane . . . into sugar". Such processing embraces all activities customary (R. 85-86) and necessary thereto, such as generating steam and power required for the processing operations, repairing the mill on the plantation and its equipment, storing supplies for the mill, laboratory work for the mill, and hauling sugar cane from the fields to the mill. When the employees are engaged in such activities, they are performing work just as necessary and indispensable and as much related to sugar cane processing, as when they watch gauges in the boiling house of the mill

or otherwise operate the processing machinery. *Second*, Waialua's employees work in the "place of employment" where Waialua is engaged in processing. The term "place of employment" includes the several separate buildings and facilities whereby Waialua carries on the actual processing and related activities necessary thereto, including hauling to and from the processing mill. The various buildings on the plantation used for repair, laboratory, warehouse and shipping purposes are located in a compact area within 300 feet of the mill building proper.

These conclusions are sustained by the applicable precedents and administrative interpretations. The statutory language exempts all sugar cane processing, unlike other processing exemptions provided in Section 7(c), which exempt only particular isolated operations.

VI.

The employees, when repairing dwellings and maintaining related domestic facilities on the plantation, were not engaged in interstate commerce, or in occupations necessary to the production of goods for such commerce. The dwellings and related services in the Waialua "villages" were originally established on the plantation because there were no residential facilities otherwise conveniently available. The village of Haleiwa has since grown up as an independent community off the plantation, located about one mile from Waialua village, providing residential, retail and service facilities for Waialua employees and others on the Island of Oahu. No employee of Waialua is required to live on the plantation or in plantation houses or to use any service or facility furnished by Waialua; and indeed some of Waialua's employees, including some employee-petitioners, live off the plantation and in houses not owned or supplied by Waialua. Many persons living in such houses are not employed by Waialua, and either work off the plantation or own, operate or are employed by independently controlled businesses. The dwelling facilities

are rented on a cash basis, and the relationship between Waialua and the occupants is that of landlord and tenant. The employees are engaged on houses and services and facilities which are not themselves produced for or shipped in interstate commerce, nor are they used in or devoted to the production of goods for interstate commerce. They serve the personal needs of the occupants when the latter are not engaged in producing goods for interstate commerce. Findings by the District Court contrary to or inconsistent with the above are unsupported by the evidence and clearly erroneous.

None of these activities has such a "close and immediate tie with the process of production" of goods for commerce as to be deemed "necessary" to such production. *Kirschbaum* v. *Walling*, 316 U. S. 517, 525. When engaged in such activities, the employees are even further removed from production for commerce than the maintenance employees of the large office building who were excluded from coverage in the *Callus* case, 325 U. S. 578, although such employees actually furnished services facilitating the interstate operations of the tenants during office hours. The work in question is as remote from interstate commerce as that of plumbers, house painters, and others in local trade in innumerable villages in the United States. The Act was designed to leave such local business to the protection of the states. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570. Such activities are subject to the Territorial Wage and Hour Law rather than the Federal Act.

Coverage under Section 3(j) of the Act requires that the activities be "necessary" to the growing and processing of Waialua's sugar cane, while exemption under Sections 13(a)(6) and 3(f) requires only that the activities be carried on as "an incident to or in conjunction with" Waialua's farming operations. Hence, if such activities are covered by Section 3(j), they are necessarily exempt under Sections 13(a)(6) and 3(f).

VII.

Assuming that any of the employees' activities is not exempt under either Section 13(a)(6) or Section 7(c), an employee is nevertheless exempt in any workweek in which he does not devote a substantial part of his time to non-exempt activities. The Department of Labor has allowed a tolerance of non-exempt work ranging from 20% to 49.9% in the case of many other exemption provisions in the Act, such as those for fisheries and local newspapers. The broad scope intended by Congress for the exemptions under Sections 13(a)(6) and 7(c) would be effectively denied unless a tolerance of non-exempt work is also accorded under those exemptions.

ARGUMENT IN NO. 358.

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERTAINING WAIALUA'S DECLARATORY JUDGMENT SUIT.

Waialua's suit for declaratory relief presents an actual and important controversy concerning the legal relations between Waialua and the employees under the Act, which would be conclusively terminated by a declaratory judgment. The pendency of the employees' counterclaim herein, which the court below declined to dismiss (R. 747), is itself conclusive evidence of the serious, adversary, immediate and continuing controversy between the parties concerning the interpretation and application of the Act to particular employees engaged in clearly defined tasks during specified workweeks.

The existence of an adversary proceeding is apparent from examination of Waialua's Amended Complaint (R. 10-14); the employees' Answer and Counterclaim (R. 16, 18-19); Waialua's Reply (R. 20-24); the Stipulation entered into by the parties (R. 37); Waialua's Statement of Points on Appeal (R. 673 *et seq.*); and other detailed contentions of the parties in the two courts below. The cir-

cumstances are comparable to those in *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local*, where "many persons in the class of the defendants are making actual claims upon the several plaintiffs for overtime compensation, based on the contention made by defendants in these actions." 40 F. Supp. 4, 6 (N. D. Ala.) *aff'd* 135 F. (2d) 320 and 137 F. (2d) 176 (C. C. A. 5), *aff'd* 321 U. S. 590.

Under applicable decisions of this Court, it was manifest error for the Court of Appeals to reverse the judgment of the District Court for alleged abuse of discretion in entertaining Waialua's suit for declaratory relief. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 239-242 (reversing both courts below); *Currin* v. *Wallace*, 306 U. S. 1, 9; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272-274 (reversing both courts below); *Altvater* v. *Freeman*, 319 U. S. 359, 363-366 (reversing Court of Appeals); *Tunstall* v. *Brotherhood*, 323 U. S. 210, 212-214 (reversing both courts below); *Railway Mail Ass'n.* v. *Corsi*, 326 U. S. 88, 93; *Order of Railway Conductors* v. *Swan*, 329 U. S. 520; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 92; *Hilton* v. *Sullivan*, 334 U. S. 323; *McGrath* v. *Kristensen*, 340 U. S. 162, 169-171; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 140-142 (reversing both courts below); *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U. S. 128 (reversing both courts below); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (reversing Court of Appeals). See also *Akron, Canton & Youngstown R. R. Co.* v. *Barnes et al.*, 215 F. (2d) 423, 426-427 (C. C. A. 7), *cert.* granted and judgment vacated (on account of mootness), 348 U. S. 893; 28 U. S. C. § 2201; Rule 57, Federal Rules of Civ. Proc. 28 U. S. C. A.; Notes of Advisory Committee. *Id.*

This Court has repeatedly approved application of declaratory judgment procedure to controversies concerning interpretation and application of the Fair Labor Standards Act. See *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local*, 321 U. S. 590, 592; *Jewell Ridge Coal Corp.* v. *Local #6167*, 325 U. S. 161. To the same effect are repeated rulings by

the lower Federal courts. *E.g., Bowie* v. *Claiborne*, (D. Puerto Rico) 1 Labor Cases ¶ 18,443, *aff'd. sub. nom. Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Sunshine Mining Co.* v. *Carver*, 34 F. Supp. 274 (D. Idaho); *Green Head Bit & Supply Co.* v. *Hendricks*, 49 F. Supp. 698 (W. D. Okla.).

The circumstances of the instant case render inapplicable the cases cited by the court below (R. 741, 745, 840-842), or recently decided by this Court, in which declaratory relief was denied because the suit was either moot, premature, or otherwise advisory in character. *E.g., Longshoremen's Union* v. *Boyd*, 347 U. S. 222; *Public Utilities Commission* v. *United Airlines*, 346 U. S. 402; *Public Service Commission* v. *Wycoff*, 344 U. S. 237.

The entire proceeding on remand manifested the most meticulous compliance by the parties and the District Court with every requirement indicated in the first opinion of the Court of Appeals.[13] That opinion, while criticizing the declaratory judgment suit in a number of particulars, did not direct its dismissal. Recognizing the discretion which rested in the District Court to entertain the action (R. 840-841), the Court of Appeals on that occasion remanded for further proceedings including, as one suggested alternative, "the entry of detailed findings as to each employee defendant, based upon an adequate record" (R. 842). Nowhere in its first opinion did the Court of Appeals declare or even imply that such compliance would eventuate in a second reversal upon the entirely new basis of alleged "col-

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[13] R. 826-840. Thus: (1) the judgment of the District Court gave a mandate as to each employee involved; (2) detailed and specific findings of fact were entered as to each such employee; (3) the action was limited in time to the period November 20, 1946 to and including September 14, 1947; (4) the class representation aspects of the action were eliminated; (5) the union and union official were dropped as parties defendant; (6) a single trial was had of both Waialua's suit for declaratory judgment and the employees' counterclaim under Section 16(b) of the Act; (7) 22 of the 42 employee defendants testified orally in the action.

lusion" advanced in the second opinion (discussed in Point II, *infra*).

In denying the petition for rehearing below, the Court of Appeals called attention to "considerations of expense in futile proceedings" (R. 747). From the outset of this complex litigation in 1947, Waialua has indeed been mindful of such considerations. Recognized grounds for declaratory relief include the avoidance of threatened multiple suits for damages, with which Waialua was here confronted.[14] Waialua is constrained to conclude, and respectfully submits, that the expense of futile proceedings must be attributed to the error of the Court of Appeals in departing so markedly from the usual course of judicial proceedings as to require the exercise of this Court's power of supervision.

Among the numerous instances in which this Court exercised such supervisory power (*supra*, p. 26), the *Altvater* case is especially appropriate. The trial court had dismissed the plaintiff's suit for an injunction against infringement, but adjudged the patent valid under a counterclaim for declaratory relief in that respect. The Court of Appeals reversed on the ground that the declaratory action was moot. This Court held that the claim for declaratory relief presented a justiciable controversy apart from the infringement suit, and reversed and remanded with direction that the Court of Appeals review on the merits the trial court's judgment in the declaratory action. This

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[14] See *Altvater* v. *Freeman*, 319 U. S. 359, 365; Reed, J., concurring, *Public Service Commission* v. *Wycoff*, *supra*, 344 U. S. at 250-251; *Akron, Canton & Youngstown R. R. Co.* v. *Barnes, et al.*, *supra*, 215 F. (2d) at 426; *Davis* v. *American Foundry Equipment Company*, 94 F. (2d) 441, 442 (C. C. A. 7); *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28, 30 (C. C. A. 8); *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. (2d) 925, 930 (C. C. A. 3), *cert. den.* 315 U. S. 813; *Continental Casualty Co.* v. *National Household Distributors, Inc.*, 32 F. Supp. 849, 850 (E. D. Wis.); *Inland Mutual Insurance Co.* v. *Eastern Motor Lines*, 119 F. Supp. 344, 349 (W. D. S. C.).

Court also rejected the contention that the cause be ordered returned to the trial court saying:

> "If the standards of good judicial administration be considered, we fail to see why petitioners should be put to two trials of the same issues before a review by the Circuit Court of Appeals may be had. Nor would it comport with sound judicial administration to uphold a denial of appellate review where the controversy between the parties still rages and where the appeal was dismissed because of a mistaken view of the law". 319 U. S. at 366, note 6.

The Court of Appeals recognized that each of the employees involved had a remedy at law by damage suit under Section 16(b) of the Act (R. 745); but the court overlooked that the counterclaim in the very record before it was based on precisely that right of action under Section 16(b), arising out of the same transaction or occurrence as the suit for declaratory relief. *Supra*, p. 9, note 5. When Waialua called this to the attention of the Court of Appeals upon petition for rehearing, the court proceeded to construe the counterclaim "as a petition also for declaratory relief" (R. 747), although the counterclaim contained no such prayer.[15]

In sum, the District Court did not abuse its discretion in entertaining Waialua's suit for declaratory relief, and in resolving the justiciable controversy presented by the parties and the record.

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[15] Since the District Court had jurisdiction over the counterclaim entirely independent of its jurisdiction over the declaratory judgment suit, the Court of Appeals also erred in failing to review on the merits the District Court's adjudication of the counterclaim, after reversing the money judgment awarded by the District Court. See *Altvater* v. *Freeman*, 319 U. S. 359, 363-364, 366; *Pioche-Mines Consol Inc.* v. *Fidelity-Phila. Trust Co.*, 206 F. (2d) 336 (C. C. A. 9); *Isenberg* v. *Biddle*, 125 F. (2d) 741, 743 (App. D. C.); *Lion Mfg. Corp.* v. *Chicago Flexible Shaft Co.*, 106 F. (2d) 930, 933 (C. C. A. 7); *Vidal* v. *South American Securities Co.*, 276 Fed. 855, 874 (C. C. A. 2); *U. S. Industrial Chemicals Inc.* v. *Carbide & Carbon Corp.*, 52 F. Supp. 164, 166 (S. D. N. Y.).

II.

THE COURT OF APPEALS ERRED IN ORDERING DISMISSAL OF WAIALUA'S DECLARATORY JUDGMENT SUIT ON THE GROUND THE PARTIES WERE IN "APPARENT COLLUSION".

A. Waialua's Suit Was Not Rendered Collusive Because the Parties Stipulated to Most of the Facts.

Where, as here, the parties have adverse interests in an actual controversy, "it is . . . a judicial act to give judgment" on the legal relationship which "the court finds to be established by stipulated facts". See *Pope* v. *United States*, 323 U. S. 1, 12 and cases there cited; *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local*, 137 F. (2d) 176, 179-180, *aff'd* 321 U. S. 590; *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52, 60-63. This Court has frequently given effect to stipulations or concessions of pertinent facts in litigation concerning the coverage and application of the Act. See *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 758 (conceded that field employees were engaged in production of goods for commerce); *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 391 (stipulated that redcaps were employees and were engaged in commerce); *Kirschbaum* v. *Walling*, 316 U. S. 517, 519 (conceded that tenants of building involved were principally engaged in production of goods for commerce); *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, 725, 729 (stipulated that meat boners in a packing plant owned their own tools and were not subject to union authority). The policy favoring stipulation of undisputed facts is embodied in the Federal Rules of Civil Procedure (Rules 16 and 36, 28 U. S. C. A.); and this practice is especially appropriate in a declaratory judgment suit which "often involves only an issue of law on undisputed or relatively undisputed facts". See Notes of Advisory Committee, Rule 57, Fed. Rules Civ. Proc. 28 U. S. C. A. See also *Wickard* v. *Filburn*, 317 U. S. 111, 125 (stipulation summarizing economies of

wheat industry, as basis for exercise of constitutional power over interstate commerce).[16]

B. The Court of Appeals Wholly Misconceived the Nature of the Action When It Directed Dismissal and Stated that "the Entire Cause Was Tainted by Apparent Collusion Between the Parties in the Attempt to Obtain an Advisory Opinion Upon Constitutional Questions" (R. 747).

Waialua vigorously disagrees with the *dictum* of the Court of Appeals that employment relations in agriculture are beyond the constitutional power of Congress (R. 740, 742-743). In the proceedings below, counsel for both parties, as well as counsel for the Department of Labor (which appeared *amicus curiae*), separately and independently assumed in trial and argument that all the employees involved (other than those engaged in making dwelling repairs and maintaining related domestic facilities, discussed in Point VI, *infra*) are engaged in the production of goods for commerce. That assumption was made in good faith by the respective parties and was compelled by the applicable decisions of this Court. See *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 759. All parties rightly

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[16] The cases cited by the Court of Appeals are not relevant. *E.g.*, in *United States* v. *Johnson*, 319 U. S. 302, plaintiff had brought in a fictitious name a suit instituted at defendant's request. The plaintiff had not employed or even met the attorney of record who appeared in his behalf; had not read the complaint filed in his name; had no knowledge of the amount of the judgment sought until advised in the local press; and had filed no brief. In *Lord* v. *Veazie*, 8 How. 251, there was no adversary relationship between the parties. This Court said, however, that stipulations by adverse parties of facts known to be true, "far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice". 8 How. at 255. In *Ward* v. *Alsup*, 100 Tenn. 619, 46 S. W. 573, also cited by the Court of Appeals, the state court indicated in *dictum* that the suit would be fictitious if its main object were to affect third persons rather than to redress the plaintiff's grievance.

recognized that the constitutional power of Congress under the commerce clause reached the production of agricultural commodities destined for interstate movement. See *Wickard* v. *Filburn*, 317 U. S. 111, 118; *Santa Cruz Fruit Packing Co.* v. *Labor Board*, 303 U. S. 453; *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 236-237. The parties' failure to raise constitutional questions which were entirely lacking in substance is a wholly unsound basis for the Court of Appeals' finding of "collusion". *Cf. Mazer* v. *Stein*, 347 U. S. 201, 206-207.

The actual controversy between the parties, as presented by the record, briefs, and oral argument, revolved around the construction of the Act rather than the constitutional power of Congress over agricultural employment. Contrary to the suggestion of the Court of Appeals, there was no agreement between the parties, by stipulation or otherwise, as to conclusions of law or constitutional power. The parties have been vigorous antagonists throughout the litigation, and neither Waialua nor the employees conceded any issue of fact or law which would have foreclosed any tenable argument supporting their respective positions. The fact that this proceeding is decisive of similar problems affecting all Hawaiian sugar plantations (and large segments of continental agriculture) simply contributes to the desirability and importance of declaratory relief as prayed by Waialua.

Waialua had contended below, and the Court of Appeals' opinion specifically agreed, that all the employment here involved is exempt from the Act in view of the broad agricultural exemption in Sections 3(f) and 13(a)(6). The Court of Appeals therefore did not find it necessary to consider Waialua's further contention that any employees not exempt under Section 13(a)(6) were exempt under the year-round exemption from overtime requirements for processing of sugar cane in Section 7(c). In any event Waialua's declaratory judgment suit was properly founded upon the appropriate interpretation of these exemptions under the

Act of Congress, rather than upon the erroneous constitutional argument adopted by the Court of Appeals as the basis for its erroneous conclusion that Waialua had committed an "error in approach" which justified dismissal of its suit for declaratory judgment.

Manifestly the Court of Appeals should have addressed itself solely to the issues of statutory construction, under the established doctrine that Federal courts will not pass upon constitutional questions unless unavoidable. *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129, 136-137; *cf. Mazer* v. *Stein*, 347 U. S. 201, 206-207. By injecting a constitutional issue not necessary to the decision or presented by the parties or the record, the Court of Appeals demonstrated a fundamental hostility to declaratory judgment procedure concerning statutory construction. The arbitrary refusal of declaratory relief in appropriate cases is contrary to the intent of Congress, as well as the repeated decisions of this Court in similar circumstances.

III.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

The petitioners in No. 357 assumed that the Court of Appeals decided the issues of statutory construction presented in Waialua's declaratory judgment suit and the employees' counterclaim. Waialua's petition in No. 358 took the contrary view, since the Court of Appeals actually directed that Waialua's suit be dismissed and that the employees' counterclaim be "left undismissed" (R. 747). If the Court of Appeals had resolved the statutory issues "for all practical purposes", as stated in the Memorandum filed by the Secretary of Labor in support of the petition in No. 357, the order below should have directed the District Court to enter judgment *for* Waialua and *against* the employees. Waialua's efforts to clarify the order by petition for rehearing were unavailing (R. 746-747). The Court of Appeals construed the counterclaim "as a petition also for declaratory relief", and stated that the "entire cause",

including the counterclaim, was "tainted by apparent collusion" (R. 747).

This Court granted the petitions for certiorari in both No. 357 and No. 358. Under applicable precedents,[17] if this Court deems it appropriate to resolve the entire controversy upon the present record, findings and stipulated facts, Waialua has fully briefed its position hereinafter on all statutory issues which appear in the record and were passed upon by the District Court.

ARGUMENT IN NO. 357.

We have already discussed the jurisdictional and constitutional issues which are expressly or necessarily presented by the petition for certiorari in No. 357. We now turn to the issues on the merits of statutory construction, which are either presented in that petition or which appear in the record and were passed upon by the District Court.

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[17] *Cf. New York Telephone Co.* v. *Maltbie*, 291 U. S. 645; *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176; *Manufacturers' Finance Co.* v. *McKey*, 294 U. S. 442, 453-454; *Fischer* v. *American United Life Ins. Co.*, 314 U. S. 549, 555-556; *United States* v. *Ballard*, 322 U. S. 78, 88; *Bates* v. *United States*, 323 U. S. 15, 17; *Tunstall* v. *Brotherhood*, 323 U. S. 210, 214; *United States* v. *Beach*, 324 U. S. 193, 196; *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U. S. 464, 468; *Labor Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 237-238; *Labor Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 661-662; *Walters* v. *St. Louis*, 347 U. S. 231, 233.

IV.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYEES WERE "EMPLOYED IN AGRICULTURE" WITHIN THE MEANING OF SECTION 3(f) AND THEREFORE WERE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT AS PROVIDED BY SECTION 13(a)(6) WHEN THEY WERE ENGAGED IN—

(i) HAULING MATERIALS, SUPPLIES, EQUIPMENT, OR EMPLOYEES TO AND FROM THE VARIOUS FIELDS ON THE WAIALUA PLANTATION;

(ii) HAULING SUGAR CANE PRODUCED BY WAIALUA FROM THE FIELDS TO THE MILL;

(iii) GRINDING SUCH SUGAR CANE AT THE MILL INTO RAW SUGAR AND MOLASSES;

(iv) TEMPORARILY STORING, LOADING, AND SHIPPING SUCH RAW SUGAR AND MOLASSES;

(v) REPAIRING, MAINTAINING AND SERVICING (a) FIELD IMPLEMENTS, (b) HAULING EQUIPMENT AND FACILITIES, AND (c) THE MILL AND ITS EQUIPMENT; AND

(vi) SUCH OTHER INCIDENTAL OPERATIONS AS WERE NECESSARY AND INDISPENSABLE TO THE FOREGOING.

Waialua is engaged in a single enterprise—growing sugar cane and transforming the cane into a marketable product, namely raw sugar and molasses. All of the activities listed above are performed by its employees as a necessary and integral part of that enterprise (*e.g.*, R. 35-36, 94).

Functionally, the activities of Waialua listed above are similar to the activities conducted by large numbers of wheat farmers, cotton farmers, fruit and vegetable farmers, among many others, in the continental United States and are common everyday activities performed by many American farmers and farms. The farmer in each of these groups engages in extensive hauling, preparation of his product for market, and repairing and maintaining his equipment and supplies. Moreover, the activities of Waialua and the employees, from the growing of sugar cane to the processing thereof, are substantially the same as those conducted by other sugar plantations in Hawaii.[18]

The employees nevertheless argue that the operations of Waialua are so unique that the above activities do not

[18] Bulletin No. 926, U. S. Department of Labor, "*The Economy of Hawaii in 1947*", pp. 33-50. See also R. 32, 396.

come within the agriculture exemption in the Act. Thus, they stress (1) the large size of the operations in terms of product, acreage, and number of employees; (2) the almost complete mechanization of the operations and the elimination of hand labor and work animals; and (3) the "industrialization" of the operations, *i.e.*, departmental organization, specialization of labor, and use of scientific techniques and methods. Waialua submits, however, that none of these considerations is relevant in determining the application of the exemption. Rather, the language and legislative history of the exemption, as well as the controlling case law, all show that the work of the employees falls within the exemption.

A. The Language of the Agriculture Exemption Exempted the Work of the Employees Involved Here.

1. *Analysis of the Statutory Language.*

This Court has said that "employment in agriculture is probably the most far reaching" of the exemptions in the Act. *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 612.

The statutory definition of "agriculture" (Section 3(f)) is divided into two distinct branches. The first distinct branch—the primary meaning—is "farming in all its branches and among other things includes the cultivation and tillage of the soil, . . . the production, cultivation, growing, and harvesting of any agricultural . . . commodities . . ." See *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755 at 762. The second distinct branch of the statutory definition of "agriculture"—the broader meaning—includes "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". This part of the definition embraces "practices, *whether or not themselves farming practices*, which are performed either by a farmer or on a farm". *Id.*, 337 U. S.

at 763. [Emphasis supplied]. Under the language of the exemption, it will be noted, such practices are exempt, if they are *either incident to* or *in conjunction with*[19] the farming operations; they do not have to be both.

Under the carefully drafted statutory language, the exemption thus starts with the growing of the agricultural commodity, continues with its cultivation and harvesting, includes its preparation for market or delivery to storage, and ends only after the farmer has delivered it to market or for transportation to market.

2. *Waialua was a farmer and the employees all worked on Waialua's own plantation, i.e., its farm.*

The Court of Appeals correctly concluded that Waialua was a "farmer" within the sense used in Section 3(f) since it was conducting the farming operations enumerated in the statutory definition of producing, cultivating, growing and harvesting sugarcane (R. 732-733, 734). Likewise the Court of Appeals correctly concluded that the employees all worked on Waialua's own plantation *i.e.*, its farm (R. 732, 733-734), the place where such farming operations were conducted.[20]

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[19] The term "incident" is defined in Webster's New International Dictionary, Unabridged Version, 1951 ed., p. 1257, as meaning "appertaining to", "directly and immediately pert. to, or involved in, something else". "Conjunction" is defined as "association", "occurrence together". *Id.*, p. 565.

[20] In some minor and sporadic instances some of the employees did some work off the plantation but such work was nevertheless clearly within the agriculture exemption. For example, in some workweeks employee Vierra hauled crushed rock from off the plantation to the plantation to be used in making concrete irrigation flumes for use in Waialua's irrigation operations (R. 250, 251). That such work was clearly exempt, see Interpretative Bulletin No. 14 of the U. S. Dept. of Labor ¶ 10(f): "The truck drivers working for a farmer, who haul garbage and feed *to* the farm for feeding pigs, also perform practices that are exempt." [Emphasis supplied]. WHM 35:356.

The District Court confined the agriculture exemption to certain specified field activities, namely preparation of land for planting, planting, ratooning, cultivating, fertilizing, irrigating, and the harvesting operation only up to the point where cars loaded with cut cane were moved from the fields on portable track to the fixed line of Waialua's narrow gauge railroad. *Supra*, p. 15. Fundamentally, the District Court's approach was based upon its finding that Waialua was engaged in five separate businesses, namely those of "farmer", "carrier", "manufacturer", "shipper", and "operator of village communities"[21] (R. 786-787, 794-795, 796, 803).

The Court of Appeals rightly rejected this clearly erroneous finding (R. 732, note 16). Every "farmer" is a "carrier" or "shipper" in the sense that (a) he hauls his products from the fields to storage, to market, to a processor, or to a carrier for transportation to market, (b) he hauls from one part of the farm to another agricultural supplies and agricultural equipment, and (c) he sends his trucks to a nearby town and hauls back necessary farm supplies and equipment. Moreover, every farmer is a "manufacturer" to the extent to which he transforms the product he grows into marketable condition. Many fruit and vegetable farmers can or pack their own fruits or vegetables; many cotton farmers gin their own cotton; and many dairy farmers process their own milk into butter and cheese. All of this is done preparatory to marketing.

The District Court also took the position that the activities here in question, namely hauling, grinding and the miscellaneous activities referred to *supra*, p. 35, were not exempt because it found that they did not take place on areas allotted to the growing of sugar cane; for example, R. 795. But this finding was clearly erroneous. In confining the agriculture exemption to field activities, the District Court confused the term "farm" with the term

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[21] Waialua's activities with respect to its plantation villages are discussed in Point VI, *infra*.

"field".[22] The term "farm" has never been limited to those portions of a farm on which agricultural products actually grow. Thousands of farms throughout the United States have field roads, barns, silos, wells and many other buildings and improvements, on the sites of which agricultural products do not actually grow. The term "farm" has never been deemed to exclude the locations of such field

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[22] The word "farm" is defined in Webster's New International Dictionary, Unabridged Version, 1951 ed., p. 919 as: ". . . a piece of land held under lease for cultivation; hence, any tract of land (whether consisting of one or more parcels) devoted to agricultural purposes, generally under the management of a tenant or the owner; any parcel or group of parcels of land cultivated as a unit". Moreover, the Secretary of Agriculture has determined "That in the case of the Territory of Hawaii, a farm means all land which is farmed by a producer, or group of producers, as a single farming unit, with cropping practices, work stock, equipment, labor, and management substantially separate from that of any other such unit". *Determination of a Farm, etc., for the Territory of Hawaii*, made by the Secretary of Agriculture under the Sugar Act of 1937 (Code of Federal Regulations, Title 7, Ch. VIII, Pt. 802, § 802.30 (2 F. R. 2108)). This Determination applied during the period involved herein. Waialua's plantation meets these definitions, since the agreed facts show:

> "All the lands devoted to the growing of sugar cane are managed and operated by the Plantation as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. Employees work in the fields moving from one area to another depending upon the program of plowing, planting, irrigating, fertilizing, applying herbicides and insecticides, weeding and harvesting. The cane lands are in various stages of production or preparation. Some acreage is being plowed and furrowed for new planting, some is being 'ratooned' (a process hereinafter described), some acreage is in young growth, some in old growth nearing maturity and other acreage is being harvested." (R. 35).

roads, or of such barns, silos, wells and other buildings and improvements.

Moreover, the District Court's position overlooks the fact that the agriculture exemption includes all activities performed "by a farmer", whether or not performed "on a farm"; and as we have shown, all the activities here in question were performed by a farmer, namely Waialua.

Furthermore, this position of the District Court is inconsistent with the second branch of the definition of agriculture and with the intent of the definition as shown by its legislative history (*infra*, pp. 45-55) and with the controlling precedents (*infra*, pp. 55-61). In fact, if this position of the District Court were accepted, the result necessarily would be to leave little or no significance to the second branch of the definition. It would add nothing to the first branch, if both were limited to field operations.

3. *All the activities of the employees in issue were within the plain language of the agriculture exemption.*

As shown by the agreed facts (R. 35-36), *supra*, p. 39, note 22, all of the activities of the employees here involved were integrated and coordinated with and an indispensable part of Waialua's operations of producing, cultivating, growing, and harvesting sugar cane. See also R. 33, 52, 67, 94, 733-734, 754-755. Moreover, they were performed only upon or with respect to the cane which Waialua grew on its own farm (R. 59, 84). This becomes doubly clear when we consider such activities *seriatim:*

Hauling: This work consisted of (i) hauling, principally by truck over field roads (*e.g.*, R. 64-66, 235-239, 248-256), of tractors and other field implements, materials and supplies, such as fertilizer, insecticides and herbicides, and of employees to and from various fields on the plantation; (ii) hauling of sugar cane produced by Waialua from the fields to the mill over a narrow gauge railroad located exclusively on the plantation (R. 59-63, 205-206); and (iii) repairing, maintaining and servicing the equipment and facilities, *e.g.*,

field roads and railroad trackage, employed in such hauling (*e.g.*, R. 206-212, 220-223, 279-283).

All of these hauling activities were necessary incidents of Waialua's sugar cane farming. None of the activities referred to in the agriculture definition in the Act, including the production, cultivation, growing or harvesting of the agricultural commodity, *i.e.*, sugar cane, or the preparation of the sugar cane for market, could possibly be performed without such hauling activities.

That all such hauling activities are indeed exempt is also clear from the language of the second branch of the agriculture definition, which specifically includes "preparation for market, delivery to storage or to market or to carriers for transportation to market". This language clearly establishes that the agriculture exemption includes all operations performed by the farmer or on the farm, as an indispensable incident to or in conjunction with the farming operations, up to and including the farmer's disposal of his product. And if Congress intended the exemption to extend to the delivery of the product to market or to carriers as it expressly provided, obviously it intended that all operations which preceded such delivery should be exempt when performed by the farmer or on the farm as a necessary incident to or in conjunction with farming operations. Thus, if transportation required in the delivery of raw sugar to carriers for transportation to market was exempt (R. 317-318), it would be unreasonable to hold that hauling of cane to the mill (R. 205-206), which preceded even the preparation for market, was not exempt. For the same reason it would be equally unreasonable to exclude from the exemption the hauling of equipment, supplies and employees to or from the fields (*e.g.*, R. 235-239, 248-256) and the repairing, maintaining and servicing of hauling equipment (*e.g.*, R. 198-201, 206-212) necessary to the continued functioning of the field operations and of the operations involved in delivering the cane to the mill.

There is no rational basis for distinguishing between that part of the operation of hauling sugar cane which took

place on the portable tracks which the District Court held exempt (R. 790, 194), and that part which took place on the permanent tracks, which the District Court held non-exempt. Both were part of the gathering in of the sugar cane (R. 732).[23] The portable tracks were used in the fields instead of the permanent tracks only because permanent tracks cannot be laid on account of the interference which would otherwise result in planting and cultivating operations (R. 60). During the short periods when portable tracks were in use in the fields, they were an integral part of the plantation's railroad system over which cane cars moved directly from the fields to the mill (*Id.*).

The employees have argued, however, that the exemption does not apply to hauling by rail on a farm. But under the statutory language, it is irrelevant, as the Court of Appeals found (R. 834), whether the cane hauling is by truck, flume, railroad or water buffalo.

Preparation for market: This work consisted of grinding the sugar cane at the mill into raw sugar and molasses, and repairing, maintaining, and servicing the mill and its equipment. As already noted, Waialua ground at the mill only the cane grown by itself on the plantation (R. 84).

If the words "preparation for market" as used in the second branch of the agriculture definition are to be given any meaning with respect to sugar cane farming, they plainly embraced the mill operations in which the employees engaged (R. 213, 310-317, 216-220).[24] Sugar cane,

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[23] Hauling on either track comes within the term "harvesting" contained in the statutory definition. See Webster's New International Dictionary, Unabridged Version, 1951 ed., defining "harvesting" at p. 1142 as "to gather in a crop" and College Standard Dictionary, Funk & Wagnalls (1943), defining "harvesting" at p. 526 as "to gather and store a crop".

[24] The Court of Appeals concluded that the work of the employees in connection with the mill operations also comes within the term "harvesting", in view of the necessity of processing the cane into

because of its highly perishable nature and weight and bulkiness, never moves in interstate commerce nor does it have any economic use as such. Rather it must be ground within a few miles of where it is grown, before moving in interstate commerce (R. 33, 731). And Waialua always processed its sugar cane into raw sugar or molasses in order to market it (R. 31, 33), following the usual practice in Hawaii.[25] Clearly then, the mill operation was "preparation [of sugar cane] for market".[26] The statutory language likewise encompassed the necessary and incidental function of keeping the mill equipment in good repair(*e.g.*, R. 310-317, 212-220, 223-226; see also R. 94).

Repair, maintenance and service of field implements (e.g., R. 97-99, 101, 191-197, 231-235, 239-243, 273-276);

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raw sugar within a few hours after it is cut (R. 732, 733). In this connection, the Court rejected (R. 731) as clearly erroneous the District Court's finding by implication (R. 753) that sugar cane can be stored two or three days without spoiling.

[25] "In Hawaii the growing of cane and manufacturing of raw sugar are combined in a single plantation, based on a planned program to provide a continuous flow of cane into the mill. Under these conditions small-scale operations are inefficient. Where small-scale farming persists, in other sugar-producing areas, there is a sharp line of demarcation between the growing of sugar cane and its processing, the farmers selling to the processors." See *Bulletin No. 926*, U. S. Department of Labor, "*The Economy of Hawaii in 1947*", p. 33. See also *Marketing Sugar Cane in Louisiana* (U. S. Department of Agriculture, 1949) pp. 3-24. The situation in Puerto Rico is described at pp. 60-61, *infra*.

[26] Such mill operation is obviously distinguishable from the refining operations referred to by the employees in their petition for certiorari in No. 357 (pp. 3, 9). The refining operations are conducted on the mainland on a non-perishable product by a cooperative, none of whose employees is here involved. Waialua is a member of the cooperative, but none of its employees is employed by the cooperative or engaged in the cooperative's work of refining sugar (R. 729-730).

keeping of records at office, (R. 108-109, 319-320); storage of materials, supplies or equipment (R. 106-108, 318-319); laboratory work for control of all field and mill operations (R. 103-105, 285-288), etc.: All of these activities are indispensable incidents of Waialua's sugar cane farming. They are part of the integrated sugar cane producing and processing enterprise conducted by Waialua.

4. *Additional erroneous interpretations of the District Court.*

(i) The District Court relied upon the departmentalization of Waialua's plantation organization, under which the employees engaged in the activities in question were carried on the payroll and accounting records as attached to different departments than the field employees (R. 793, 794, 797, 802).[27] The question of whether particular employees of Waialua were engaged in practices incident to or in conjunction with Waialua's farming operations can be determined only by examining the activities of such employees in their relation to the actual operations of Waialua, and cannot be affected by such matters as departmentalization or accounting procedures.

(ii) The District Court found that the employees engaged in the mill operation of Waialua were not engaged in an operation which was a "subordinate" part of farming and therefore their work was not "incident" to Waialua's farming operations and did not fall within the

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[27] In this connection the District Court made the clearly erroneous and misleading findings that Waialua distinguishes on its records between harvesting and main line transportation, and separates field activities from transportation at the point where cane cars are placed on the main line railroad (R. 794). But Waialua also distinguishes on its records between harvesting and *field* transportation and on such records separates field activities from transportation at the point where cane cars are placed on *portable tracks in the fields* (R. 178).

agriculture exemption (R. 796). But this finding is clearly erroneous, because the record shows that in terms of effort as represented by hours of labor and in terms of expense as represented by operating charges, Waialua's mill operations were clearly subordinate to its cultivating, irrigation, harvesting, and other general field operations (R. 178). But even assuming that Waialua's mill operation was not so subordinate and therefore was not "incident" to its "farming" operations, the argument overlooks the fact that the statutory definition of "agriculture" not only embraces "practices . . . *incident to* . . . farming operations", but as an alternative and distinct category of exempt operations, it also embraces "practices . . . performed by a farmer or on a farm . . . *in conjunction with* . . . farming operations" [Emphasis supplied]. The phrase "in conjunction with" does not mean subordinate. The mill operation was clearly "in conjunction with" the field operations of Waialua and as such was within the statutory exemption.

B. The Legislative History of Sections 13(a)(6) and 3(f) Also Shows That the Work of the Employees in Question Was Exempt Thereunder.

The comprehensive character of the "agriculture" exemption is fully borne out by its legislative history.

1. *Senate proceedings.* S. 2475,[28] which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. As the bill was introduced, agricultural laborers were exempt (§ 2(7)), but there was no definition of the term "agricultural laborer".

The Senate Committee on Education and Labor, to which the bill was referred, rewrote the agricultural exemption. The Committee bill exempted "any person employed in

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[28] The bills in their various forms—as introduced, as reported, etc.—referred to in this discussion of the legislative history are collected in "Senate Bills, 75th Cong. 1937-38, Vol. 13, 2401-2550, J-50-2d Set" (Library of Congress).

agriculture" without limitation; and the Committee wrote into the bill its own comprehensive definition of "agriculture" as including

> ". . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in sub-division (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, *and any practices ordinarily* performed by a farmer as an incident to such farming operations" [Emphasis supplied].

See S. 2475 as reported in the Senate July 6, 1937, § 2(7), Calendar No. 905, 75th Cong., 1st Sess., pp. 50-51. The Committee Report contained only a brief statement that the bill excluded—

> "persons engaged in agriculture and such processing of agricultural commodities as is *ordinarily* performed by farmers as an incident of farm operations" (*S. Rep. 884*, 75th Cong., 1st Sess., p. 6). [Emphasis supplied]

Senator Black, chairman of the Senate Committee in charge of the bill, in opening the Senate debate on the bill, stated that it—

> "*specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.*
>
> We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture." 81 Cong. Rec. 7648. [Emphasis supplied]

In debate, Senator Pope asked if "dairying" would include "the farmer who bottles his own milk and cream and sells it . . . even though he might do it in considerable quantity". Senator Black answered, "Unquestionably", and further, "I have no doubt that a dairy farmer who bottles his own milk is still a dairy farmer. The fact that he bottles it would not change his characteristics from that of a farmer." 81 Cong. Rec. 7656.

Senator Copeland read a telegram from the International Apple Association urging that the agricultural exemption be amended to include "preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities" *Id.*, p. 7656. Senator Black commented that the Committee was not in favor of exempting the packing business as it related to many agricultural products. But he significantly added: *"The farmer or the apple grower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming neighbors . . ."* [Emphasis supplied]. *Id.*, p. 7657.[29]

Senator Overton then asked Senator Black whether if a farmer has a large cotton plantation and gins his own cotton, the ginning operation is exempt. Senator Black replied in the affirmative, that such cotton ginning would be a process in the agricultural handling of cotton and that the "bill does provide that *those things done with ref-*

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[29] Senator Copeland later questioned Senator Black on the packing by a farmer of his own apples, his placing them in a storage house, and his subsequent transportation of the apples to market. Senator Black stated that such operations would be exempt. He drew an analogy between such operations and those of a farmer raising watermelons who packs his fruit in crates and then takes them to town to sell them either to a broker or from house to house. All such operations, he stated, would be exempt. 81 Cong. Rec. 7658. See also similar statements by Senator Schwellenbach (*Id.*, p. 7659) Appendix B, p. 90, *infra*.

erence to commodities produced on the farm by the farmer on the farm are not included in the possible application of the Act" [Emphasis supplied.]. *Id.*, p. 7657.

Later in the debates, Senator Black, commenting upon a suggestion of Senator Schwellenbach that the line of distinction be made at the point of agricultural operation and that "when it becomes a processing operation, a canning operation, it ceases to be an agricultural operation," stated as follows: "Going into another phase of farming, let us take the man who raises hogs. *A great many farmers who raise hogs kill their hogs on their own farms . . . They prepare the hogs for market on their own farms, and then send out the product. As the bill is framed, there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; . . .*" [Emphasis supplied]. *Id.*, p. 7659.

The debate specifically addressed itself to the processing of sugar cane. Senator Overton inquired whether a sugar plantation with a mill at which it processed its own cane into sugar would be exempt. Senator Black replied that it would depend upon whether such processing was *ordinarily* performed by a farmer upon his crop. *Id.*, pp. 7657-7658. See Appendix B, pp. 90-92, *infra*. Since the word "*ordinarily*" was later stricken from the exemption before the bill was enacted, it is obvious that the grinding by a farmer of his own cane was intended to be within the exemption whether or not "ordinarily" a farmer does such grinding. In any event, cane grinding is "ordinarily" performed on its own plantation by Waialua itself on the cane that it grows, following the usual practice in Hawaii. *Supra*, p. 43, note 25. Moreover, the colloquy between Senators Black and Overton indicates that in Louisiana also, it is the practice of some farmers to process their own cane into sugar. Appendix B, p. 92, *infra*. See also *Marketing Sugar Cane in Louisiana* (U. S. Department of Agriculture, 1949) pp. 11, 23 (over 40% of cane crop in Louisiana is grown by growers who operate their own cane grinding mills).

In the debate Senator Black also said that whether a sugar plantation's mill operation would be exempt would depend upon whether such operation was a "necessary incident" to that type of cane farming. 81 Cong. Rec. 7658. But here again the exemption was subsequently broadened to exempt "practices . . . performed by a farmer . . . *in conjunction with*" farming operations, as well as "practices . . . performed by a farmer . . . *incident to*" farming operations.

The legislative history also left no doubt as to exemption of operations and facilities functionally necessary to the growing and processing of sugar cane and to the shipment of raw sugar so processed, such as the hauling of cane from the fields to the processing plant and the repair of field, hauling, and processing equipment. On July 30, 1937, Senator McGill introduced an amendment (*id.*, p. 7888) to provide that the agricultural exemption should apply not only to practices ordinarily performed *by a farmer* as an incident to his farming operations, but also to practices performed *on a farm* as an incident to such farming operations. His amendment further provided that following the word "any practices ordinarily performed by a farmer or on a farm as an incident to such farming operations," there be added the words "including delivery to market". Senator McGill stated that the purpose of his amendment was to exempt all kinds of work done on a farm so long as it was incidental to agricultural purposes and was merely preparatory to the marketing of the field crop; and that the amendment would also exempt all kinds of labor performed in connection with making delivery to market of agricultural products. *Id.*, pp. 7888, 7927, 7928. The amendment was adopted. *Id.*, p. 7888.[30]

The bill passed by the Senate on July 31, 1937 defined "agriculture" in relevant part as including

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[30] The discussion on the McGill amendment and also on a related amendment introduced and then withdrawn by Senator McAdoo appears in Appendix B, pp. 92-95, *infra*.

". . . any practices *ordinarily performed* by a farmer or *on a farm* as an incident to such farming operations, *including delivery to market*" [Emphasis supplied].

2. *House proceedings.* The bill was thereupon referred to the House Committee on Labor. As reported by that Committee on August 6, 1937, "agriculture", insofar as relevant here, was defined as including

". . . *any practices performed by a farmer or on a farm* as an incident to such farming operations, *including delivery to market* . . ." [Emphasis supplied]. § 2(7), S. 2475 as reported, Union Calendar No. 535, 75th Cong., 1st Sess., pp. 4-5.

The bill as reported by the House Committee thus struck "ordinarily" from the definition of agriculture, so that the definition included *any practices* performed by a farmer or on a farm as an incident to farming operations, without qualifications. The Committee report made specific reference to the fact that it had struck the word "ordinarily", thus showing that such action was not inadvertent. H. Rep. 1452, 75th Cong., 1st Sess., p. 11. And the definition as ultimately enacted did not contain the word "ordinarily" or any similar limitation.

The Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill by petition of the House membership. However, on December 17, 1937, the bill was recommitted to the Labor Committee. At that time, insofar as relevant, "agriculture" was still defined as when the bill was reported on August 6, 1937.

On April 21, 1938, another draft of S. 2475 was reported to the House. As reported the definition of "agriculture" was again broadened, and, insofar as relevant, read as follows:

" 'Agriculture' includes . . . *any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for trans-*

portation to market" [Emphasis supplied]. § 3(f), S. 2475, 75th Cong. 3d Sess., reported with amendment, Union Calendar No. 804, p. 50; *H. Rep. 2182*, 75th Cong. 3d Sess., pp. 2, 8.

This definition added the phrases: "preparation for market,[31] delivery to storage . . . or to carriers for transportation to market". The bill passed the House on May 24, 1938 in this form. 83 Cong. Rec. 7397, 7450.

3. *Conference Report and debates thereon.* The Conference Report not only retained every single amendment that had broadened the definition of "agriculture", but it made that definition still more inclusive by exempting all practices performed by a farmer or on a farm "*in conjunction with such farming operations*". 83 Cong. Rec. 9246-9247. Thus Congress was even unwilling to restrict the definition to practices that were *incident* to farming operations, but made explicit its intent that the exemption should apply as well to practices *in conjunction with farming operations*.

In Senate debate on the Conference report, Senator Elbert D. Thomas, who had succeeded Senator Black as chairman of the Senate Committee on Education and Labor, and was chairman of the Senate conferees, stated that the agricultural exemption was purposely all-inclusive. 83 Cong. Rec. 9162-9163. See Appendix B, p. 96, *infra*.

4. *Conclusion on legislative history.* Congress started with a comprehensive exemption of agricultural labor; and at every stage of its consideration by one or the other of the houses of Congress, as the bill worked its way through to passage, the definition was made more and more all-inclusive. Without the broad definition of "agriculture"

[31] Unlike similar language in Section 13(a)(10), this is not limited by the requirement that the preparation for market of the agricultural commodities be of the commodities in their raw or natural state. Hence, any preparation for market by the farmer or on a farm is exempt even if in such preparation the raw or natural state of the commodities is changed.

which was written into the bill, it is a reasonable conclusion from the legislative history that the bill would not have been enacted into law (83 Cong. Rec. 7393, 9257).

No distinction was drawn by Congress between "large" or "small" farms or between "hand labor" or "mechanized" farms. *Cf. Labor Board* v. *Campbell*, 159 F. (2d) 184, 187 (C. C. A. 5). Waialua's field operations are no less mechanized than its processing or hauling operations (R. 57, 115, 754-755); and throughout American agriculture, growing operations are commonly integrated with processing operations. *Supra*, p. 35.

Congress legislated with full appreciation of the accelerating pace of technology in American agriculture. The growth in size of farms is shown by the following data for the continental United States:[32]

Year	Total Number of farms	Farms with 1000 acres or more	
		Number of such farms	Percent of all farm land in such farms
1920	6,448,343	67,405	23.1%
1935	6,812,350	88,662	29.4%
1950	5,382,162	121,362	42.6%

Furthermore, farms or plantations the size of Waialua's are not rare in the United States and its territories and possessions. The last available census disclosed 7,152 farms with 10,000 acres or more. 2 *U. S. Census of Agriculture* (1950) c. 10, p. 774, Table 4.

Much of the trend toward larger farms, as shown by the distribution of farms by size for the various censuses, "has been due to the consolidation of farms into larger operating units made possible by increased mechanization." 2 *U. S. Census of Agriculture* (1950) c. 10, p. 772; see also c. 3, pp. 198-204. The index of farm labor productivity has increased from 81 in 1920 and 96 in 1935 to 176 in 1953. See *Statistical Abstract of the United States 1954*, p. 668. Farmers' total expenditures for motor vehicles, machinery

[32] *Statistical Abstract of the United States 1954* (Bureau of Census), p. 642.

and equipment, have increased from $532 million in 1935 to $3.3 billion in 1952. The value of farm implements and machinery on American farms has increased from $2.1 billion in 1935 to $16.6 billion in 1953. *Id.*, p. 656. On the total balance sheet of American agriculture, the relative value of such mechanized equipment in proportion to farm realty has doubled since 1940. *Id.*, p. 634.[33]

Hawaiian agriculture was developed around the larger-type farm when the Act was passed. Hawaiian farms with 500 acres or more totalled 2,398,145 acres out of 2,485,648 acres in all Hawaiian farms in 1940. *Id.*, p. 944. In 1938, the average Hawaiian sugarcane acreage per farm was 4,413 acres, contrasted with an average of 1,001 acres in Florida, 28.3 acres in Louisiana and 31.7 acres in Puerto Rico. See *Agricultural, Manufacturing and Income Statistics for the Domestic Sugar Areas* (U. S. Department of Agriculture 1954) pp. 137, 72, 84, 106, 121.

Moreover, Congress has repeatedly declined to deny exemption to so-called "mechanized" or "industrialized" agriculture, notwithstanding arguments presented on behalf of Hawaiian plantation employees by the union representing the employees (R. 119, 120). *Hearings on Fair Labor Standards Act Amendments of 1949*, Senate Committee on Labor and Public Welfare, 81st Cong., 1st Sess., pp. 972-977, 979-981; *Hearing on S. 2386* (among other bills), Committee on Labor and Public Welfare, 80th Cong., 2d Sess., pp. 317-334; *Hearings on S. 1349*, Committee on Education and Labor, 79th Cong., 1st Sess., pp. 1048-1070. Indeed mechanization is recognized as the key to sound competition and improved labor conditions in the sugar cane

[33] American farmers expend $745 million per year for repairing farm machinery and tractors. See *Statistical Abstract, supra*, p. 656 (data for 1949; about 50% of farmers reporting). This total includes expenditures for both labor and parts (excluding motor truck and automobile repairs) but does not include the wage cost of repair work by regular farmhands.

industry. See *The Marketing of Sugar Cane in Puerto Rico* (U. S. Department of Agriculture, 1950) pp. 42-43.

The Court of Appeals accordingly rightly rejected (R. 738 note 28, 834) the District Court's position (R. 792, 796) that exemption should be denied employees engaged in the activities here involved because of the size, mechanization and "industrialization" of such activities. When Congress wanted to make an exemption depend on size, as it did in some instances under the Act,[34] Congress used specific and appropriate language. *Cf. Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 614; *Lovvorn* v. *Miller*, 215 F. (2d) 601 (C. C. A. 5).

C. Related Exemptions for Agricultural Processors Emphasize the Far-Reaching Character of the Agriculture Exemption.

The determination of Congress to exempt all activities conducted by the farmer as an incident to or in conjunction with his farming operations is underscored by the widespread exemptions which were also granted to non-farmer processors of agricultural commodities in Sections 7(c) and 13(a)(10). The legislative history shows that those exemptions were granted in order to avoid imposing additional costs upon the farmer. See in particular 83 Cong. Rec. 7325, 7326, 7401, 7402, 7407-7408; and see also 81 Cong. Rec. 7648-7673, 7876-7888, 7927-7929, 7947-7949, 7957, and 83 Cong. Rec. 7419, 9162-9163, 9250, 9252, 9254. In fact, as the Congressional debates show, such exemptions were an integral part of the same general exemptive scheme for agriculture. *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 612-613.

If Congress exempted the processing of agricultural

[34] See for example, Sec. 13(a)(8)—exemption for newspapers having a circulation of less than four thousand; Sec. 13(a)(11)—exemption for switchboard operators of telephone exchanges having 750 or fewer stations; Sec. 13(a)(15)—exemption for employees of employer engaged in forestry or lumbering operations if number of such employees does not exceed twelve.

commodities by non-farmers to spare the farmer additional costs, it manifestly intended the comprehensive language of Section 3(f) to exempt operations by farmers themselves, where additional costs would be even more certain.

D. The Decided Cases Also Show That the Work of the Employees in Question Was Exempt Under the Agriculture Exemption.

The foregoing analysis of the language and legislative history of the agriculture exemption is fully supported by this Court's decision in *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755. That case held that the employees of a farmers' mutual irrigation company were not within the agriculture exemption. The irrigation company owned several reservoirs and a system of canals which were operated and maintained by its employees. The company's sole activity was the collection, storage and distribution of water for irrigation purposes to its own stockholders, all of whom were farmers. However, the irrigation company was not a farmer because it did not grow anything and none of its activities was performed on a farm.

This Court noted that "fortunately . . . the . . . Act provides a carefully considered definition" of agriculture. 337 U. S. at 762. The opinion then referred to the two distinct branches of the definition of "agriculture". *Supra*, p. 36. The opinion concluded that the activities of the employees of the company did not come under the first branch of the agriculture definition—the primary meaning of farming in all its branches—because the company "owns no farms and raises no crops" (*id.*, p. 763) and "is not engaged in cultivating or tilling the soil or in growing any agricultural commodity" (*id.*, p. 764). The Court then said concerning the company's irrigation work (337 U. S. at 766):

> ". . . coming to the second branch of the definition of agriculture [the broader meaning] . . . it does constitute a practice performed as an incident to or in conjunction with farming. If the Act exempted all such practices, the company would be exempt. But the

exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm."

The Court added (*id.*, p. 767):

> "In the face of this careful use of language, we are required to limit the exemption as Congress intended it should be limited, to practices performed by a farmer or on a farm. In the present case it is clear that the work of the company's employees is done neither on a farm or by farmers".

In the instant case, however, Waialua does raise crops, does cultivate and till the soil, and does own a farm, and consequently the employees, when performing these activities, clearly come within the first branch of the agriculture definition. And the hauling, processing and other activities of Waialua, referred to *supra*, pp. 40-44, do constitute "practices . . . performed by a farmer . . . on a farm as an incident to or in conjunction with" the cultivating, tilling, growing, etc., operations performed by Waialua, and therefore come within the second branch of the agriculture definition.

Significantly, note 15 to this Court's decision (*id.*, p. 766) clearly states that the processing, on a farm, of farm commodities is incidental to or in conjunction with the farming operation by which the commodities are produced. The language is as follows:

> "[15] Although not relevant here, there is the additional requirement that the practices be incidental to 'such' farming. *Thus, processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers* and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture. *Bowie v. Gonzales*, 117 F. 2d 11". [Emphasis supplied].

It necessarily follows that the processing, on a farm, of commodities produced by the same farmer on the same

farm is incidental to or in conjunction with the farming operation of that same farmer. Moreover, the citation of *Bowie* v. *Gonzalez* indicates that the processing which this Court had most definitely in mind is the processing of sugar cane into raw sugar. And the rule applicable to processing applies equally to the other activities of Waialua here involved.[35]

The employees argue, however, that the reasoning in the *Farmers Irrigation* opinion (337 U. S. at pp. 760-762) renders the exemption inapplicable to many of Waialua's activities, which the employees assert are separately organized as independent productive activities and are no longer a part of the agricultural function. We submit that the employees have misconstrued this Court's meaning, which was simply that an activity, which would otherwise be exempt as a practice performed by a farmer, would not be exempt if performed by a separate entity or business organization. Noting that the employees of Farmers Irrigation Company were not the employees of the farmers, but were hired, fired, controlled and directed by the separate irrigation company, this Court concluded:

> "The controlling fact is that the company has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system. The function of supplying water has thus been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers are forbidden, by the company's by-laws, to interfere. Those employed in that activity are employed by the company, not by the farmers who own the company." (337 U. S. at p. 768)

[35] See also the following lower court decisions, which have applied the agriculture exemption to employees engaged in activities other than cultivation of the soil, and notwithstanding the mechanized or industrialized character of the operations involved: *Damutz* v. *Pinchbeck*, 66 F. Supp. 667 (D. Conn. 1946), 158 F. (2d) 882 (C. C. A. 2d) (fireman in ice plant); [illegible] notwithstanding that the

The employees also rely on decisions of the Court of Appeals for the First Circuit relating to sugar cane operations in Puerto Rico—*Bowie* v. *Gonzalez*, 117 F. (2d) 11 and 123 F. (2d) 387; *Calaf* v. *Gonzalez*, 127 F. (2d) 934, and *Vives* v. *Serralles*, 145 F. (2d) 552.

The employees involved in the *Bowie* and *Calaf* cases were engaged in transporting and processing sugar cane which independent growers grew on their farms as well as sugar cane which their employer grew on his farms. The transportation and processing by such employees of the sugar cane of the independent growers was not incidental to or in conjunction with the farming operations of their employer and therefore did not come within the second branch of the agriculture definition. *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 766, n. 15. It is true that the decisions in these cases, 117 F. (2d) 11, 18 and 127 F. (2d) 934, 936-938, contain language indicating that in the opinion of the court the transportation and processing by employees of sugar cane grown by their employer would not come within the agriculture exemption. However such language was not necessary to the decisions. Furthermore the Court of Appeals for the First Circuit has subsequently indicated that these decisions stand for the proposition that the employees who work on the products of more than one farm do not come within the agriculture exemption. *Puerto Rico Tobacco Marketing Coop. Ass'n.* v. *McComb*, 181 F. (2d) 697, 701. The same explanation of the *Bowie* and *Calaf* decisions was given by the Court of Appeals below (R. 836; see also R. 737-738, note 26).

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growing of horticultural products is highly mechanized"; *Miller Hatcheries* v. *Boyer*, 131 F. (2d) 283 (C. C. A. 8)—(employees in a commercial chick hatchery located in a city, notwithstanding that the hatching of baby chicks by a commercial hatchery is an "industrialized" activity); and *Bruno* v. *Hills Brothers Co.*, 7 Labor Cases ¶ 61,793 (D. Puerto Rico 1943)—(employees engaged in canning and packing grapefruit and curing of citron raised by the employer on its own farms).

Vives v. *Serralles*, *supra*, dealt with the application of the agriculture exemption to employees of an employer who grew sugar cane on several separate farms. On one of the farms the employer operated a mill where the sugar cane was processed. The employer also owned and operated a railroad which was used in the transportation of sugar cane from the outlying farms to the mill. The railroad was not used to transport sugar cane grown on the farm where the mill was located. The case involved two groups of employees: (1) employees on the outlying farms who transported the sugar cane, after it was cut, to concentration points where railroad sidings were maintained; (2) employees on the farm where the mill was located, who transported sugar cane, after it was cut, to the mill. The transportation above referred to was in railroad cars pulled by oxen over portable tracks, in ox-carts, or in steel cars pulled by tractors. The court held that both groups of employees were within the agriculture exemption. The court pointed out that the situs of the activities of both groups of employees was on the farm and that the transportation operations were really part of harvesting. The relevance of the holding to the instant case concerns the second group of employees, who worked on the farm where the mill was located and who transported the sugar cane, after it was cut, to the mill on that farm. Their activities were comparable to the activities of the sugar cane hauling employees of Waialua.

From the foregoing it appears that the proper interpretation of the decisions of the Court of Appeals for the First Circuit is that they hold that sugar cane hauling and processing employees are within the agriculture exemption when they are hauling or processing sugar cane grown by their employer, but that such employees are not within the exemption when they are hauling or processing sugar cane grown by others than their employer. On this interpretation, there is no conflict between the Court of Appeals for the First Circuit and the Court of Appeals for the Ninth Circuit.

In any event, the First Circuit cases are not in point

because of the clear differences between sugar production in Puerto Rico and in Hawaii. Under the Puerto Rico system, the sugar mill, or "centrale", is owned by individuals, a partnership or a corporation, and grinds sugar cane grown on several separate farms which are (1) farms owned and operated by the centrale, and (2) farms owned and operated by independent growers, known as colonos, who are too small to afford their own mill. The mill may or may not be located on one of the farms whose cane it processes. The centrale also operates a railroad transportation system which hauls to the mill both the sugar cane grown by the centrale on all its farms and also the sugar cane grown by the colonos on their farms. The centrale operates its mill and transportation system as a single enterprise with supervision and employees separate from the farms which it operates. Each of the farms in turn has its separate supervision and employees. Usually, each colono has his own portable tracks on his farm, on which he hauls cane to a "concentration point" at the edge of his farm, where his cane is unloaded and delivered to the centrale. The centrale then reloads the cane on railroad cars on its main line and hauls it to the mill. Where the cane comes from the centrale's own farm or farms, the same system is followed except that, of course, the centrale itself through personnel working on the farm or farms performs all portable track operations.[36]

[36] These facts as to the centrale system are gathered from the District Court's decision in *Bowie* v. *Claiborne* (D. Puerto Rico 1939) 4 Labor Cases ¶ 18,443 and the First Circuit's decisions in *Bowie* v. *Gonzalez*, 117 F. (2d) 11 and *Calo* v. *Gonzalez*, 127 F. (2d) 934. For complete details see *The Marketing of Sugar Cane in Puerto Rico* (U. S. Department of Agriculture 1950) pp. 10-21. In the period covered by the instant litigation (1946-1947), 13,080 "farms" in Puerto Rico raised sugar cane, on an average growing area of 27.9 acres per farm. In the same time period, there were only 34 such farms in Hawaii (R. 32), with an average cane growing area of 6,224 acres per farm. See *Agricultural, Manufacturing and Income Statistics for the Domestic Sugar Areas* (U. S. Department of Agriculture 1954) pp. 121, 137.

The factual situation in Puerto Rico is thus distinguishable from the instant case in the following important respects: (i) In Puerto Rico the main line transportation facilities and mill involved are not incident to or integrated with any single farming operation by one owner-farmer. *Rather they serve many farmers and many farms.* Here, however, Waialua hauls and grinds only its own cane (R. 59, 84) and all such cane is grown by the one farm. (ii) In Puerto Rico the railroad transportation system is not located on any single farm as it is in the instant case (R. 59, 721, 722). (iii) In Puerto Rico the cane, after being cut on a farm, is hauled to a concentration point at the edge of the farm where it is unloaded and delivered to the transportation system of the centrale. The centrale then reloads the cane on railroad cars and hauls it to the mill. Here, however, there is no concentration point at which cane is collected and unloaded. The District Court's findings to the contrary (R. 758, 790, 795) are clearly erroneous, since the agreed facts show that cane cut in the fields is loaded into rail cars and moves in one continuous operation over portable tracks and permanent tracks directly to the mill (R. 60, 61, 62). There is no common pile or piles of cane in any field and no cane is ever piled at the edge of the field.

E. The Administrative Interpretations of the United States Department of Labor Also Support the Exemption of the Employees Here Involved Under the Agriculture Exemption.

In 1939, shortly after the enactment of the Act, the Department issued Interpretative Bulletin No. 14 (WHM 55:351 *et seq.*) in which it announced various interpretations of Sections 13(a)(6) and 3(f) and also of Section 7(c) and Section 13(a)(10). The interpretations in Interpretative Bulletin No. 14 represented the "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion", and as such are entitled to great weight. *United States* v.

American Trucking Associations, Inc., 310 U. S. 534, 549.

Section 10(b) of Interpretative Bulletin No. 14 set forth the interpretations with regard to the scope of the term "preparation for market", as used in the second branch of the agriculture definition. The term was defined as including various operations performed by farmers to make ready their products for market, such as packing and canning fruits and vegetables, packing and canning dairy products, stemming tobacco, ginning cotton and also "*manufacturing raw sugar*" *and molasses from sugar cane.* WHM 35:355.

The interpretation relating to the manufacture of raw sugar and molasses from sugar cane was withdrawn after the decision of the Court of Appeals for the First Circuit in *Bowie* v. *Gonzalez*, 117 F. (2d) 11. WHM 35:355, Editor's Note. The withdrawal of the interpretation is not persuasive because it did not represent "contemporaneous construction" and because it was based on an erroneous interpretation of the decision in the *Bowie* case. *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 766, note 15. Furthermore, none of the other interpretations relating to the preparation for market by a farmer of other products, including canning and packing fresh fruits and vegetables, has ever been withdrawn, and apparently they still represent the position of the Secretary of Labor. There appears to be no possible reason for excluding from the agriculture exemption the processing by a farmer of sugar cane into raw sugar and molasses, when the packing and canning by a farmer of fruits and vegetables are exempt.

Section 10(f) of Interpretative Bulletin No. 14 dealt with transportation and "other practices" performed by a farmer and expressly stated:

> "If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term." WHM 35:356.

Such position has never been publicly changed by a republication of the bulletin or by a press release or by any

other means bringing the change to the attention of employers, employees and the public generally. But in the instant case, the Department has asserted that it no longer agrees with the position stated in its own Interpretative Bulletin. Such modified position of the Department is not persuasive, for the reasons already stated.

The various pertinent administrative interpretations of the Department relating to the agriculture exemption are set forth in Appendix "C", pp. 97-101, *infra*.

F. The Enforcement Policies of the United States Department of Labor Likewise Support the Exemption of the Employees Here Involved Under the Agriculture Exemption.

Almost since the enactment of the Act in 1938, a Federal Wage and Hour Office has been maintained in Hawaii, manned with personnel engaged in the enforcement of the Act.[37] This office made frequent inspections of Hawaiian sugar plantations over the years to check on compliance with the Act. At no time have the Secretary or Administrator[38] sought to enforce the overtime provisions of the

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[37] See Annual Reports to Congress of the Wage and Hour and Public Contracts Divisions: 1944, Table III, p. 36; 1948, Table D, p. 161; 1951, Appendix Table F, p. 57.

[38] Prior to May 24, 1950, the administration of the Act was in the hands of the Administrator of the Wage and Hour and Public Contracts Divisions. But effective on that date, the administration of the Act was transferred to the Secretary of Labor by virtue of Reorganization Plan No. 6 of 1950 (15 F. R. 3174), 64 Stat. 1263, 5 U. S. C. 133z-15. The Secretary however, has delegated back to the Administrator almost all of his functions in the administration of the Act. 15 Fed. Reg. 3290. Section 11(a) of the Act gives to the Administrator extensive powers of administration including full investigatory powers and including the right to bring injunction suits to restrain violations of the Act. The thoroughness with which the Administrator has exercised his powers of administration is attested by the many injunction actions which he has brought. See, for example, the following Annual Reports to Congress of the Wage and Hour and Public Contracts Divisions: 1948, p. 37; 1949, pp. 14-15.

Act with respect to employees of Waialua or any other sugar plantation in Hawaii when engaged in the activities here in question. To the contrary, in administering the Act, the Wage-Hour officials have always treated such employees as exempt.

It is true that in 1941, following the decision in *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1), *supra*, p. 62, the Department of Labor changed its previous position and announced that the agriculture exemption does not apply to sugar mill employees, even though the only cane they grind is that grown by the sugar mill owner in his own fields. Significantly, however, although 13 years have elapsed since such alleged change of position, and the present case has been in the courts for more than 7 years, the Department has not yet sought to enforce the Act with respect to employees of Waialua or of any other sugar plantation in Hawaii engaged in the activities involved here, but has continued to treat such employees as exempt.

V.

THE EMPLOYEES WERE ALSO EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT UNDER SECTION 7(c) WHEN THEY WERE ENGAGED IN—

(i) GRINDING SUGAR CANE AT THE MILL INTO RAW SUGAR AND MOLASSES, AND REPAIRING, MAINTAINING, AND SERVICING THE MILL AND ITS EQUIPMENT;

(ii) TEMPORARILY STORING, LOADING, AND SHIPPING SUCH RAW SUGAR AND MOLASSES;

(iii) HAULING SUGAR CANE PRODUCED BY WAIALUA FROM THE FIELDS TO THE MILL AND REPAIRING, MAINTAINING, AND SERVICING EQUIPMENT AND FACILITIES USED IN SUCH HAULING; AND

(iv) SUCH OTHER INCIDENTAL OPERATIONS AS WERE NECESSARY AND INDISPENSABLE TO THE FOREGOING.

The Court of Appeals did not deem it necessary to consider the Section 7(c) exemption, in view of its position that all the employees were exempt under Section 13(a)(6) (R. 746, note 45). That, of course, is also the position of Waialua. But if this Court concludes otherwise, then we

submit that employees not found exempt under Section 13(a)(6) were necessarily exempt under Section 7(c).

A. The Employees Engaged in the Activities Above Listed Were Employed in the Place of Employment Where Waialua Was Engaged in Processing Sugar Cane Into Raw Sugar and Molasses and Were Performing Activities Necessary and Indispensable to Such Processing Operation.

While Section 7(c) was not written into the Act by Congress for the purpose of exempting the farmer as such, nevertheless its language applies to a farmer who processes his own crops as much as to a processor who processes only the crops grown by others.[39] The language, insofar as relevant, exempts without time limit, all employees in "any place of employment" where their employer is "engaged . . . in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup". Thus, to fall within the exemption it is sufficient to show that (a) the *employer* is engaged "in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup" and that (b) the work of the *employees* takes place in the "place of employment" where their employer is "engaged . . . in the processing of . . . sugar cane". We submit that both factors were present here.

The term "processing" as used in Section 7(c) has al-

[39] The Court of Appeals also recognized that the agriculture exemption in § 13(a)(6) and the processing exemption in § 7(c) overlap in many significant respects (R. 727, note 4). The Department of Labor has also repeatedly recognized such overlapping. *Cf.* ¶ 10(b) of Interpretative Bulletin No. 14 with ¶¶ 15-21 thereof. See also WHM 35:754-755. The two exemptions overlap because § 13(a)(6) is an exemption from both the wage and hour provisions of the Act, while § 7(c) is an exemption from the hour provisions alone. Congress intended that if a farmer processes his own crops, such processing should be wholly exempt under § 13(a)(6). On the other hand, any processor enjoys the overtime exemption under Section 7(c).

ways been held to include all activities which are necessary to processing. See cases and administrative interpretations discussed *infra*, pp. 68-72. As applied to Waialua and its employees, the "processing" included such necessary and incidental activities as the production of steam and power for use in performing the processing operations, the repair and maintenance of the mill and its equipment, the storage of supplies for the mill, laboratory work for the mill, and the hauling of raw materials, *i.e.*, the sugar cane to the mill. When the employees were engaged in such activities (*e.g.*, R. 85-86, 90, 205-206, 212-220, 223-226, 227-231, 243-248, 266-273, 286-288, 318-319), they were performing work just as necessary and as much related to sugar cane processing, as when they watched gauges in the boiling house or otherwise operated the processing machinery (R. 310-317).[49] The employees were engaged in processing, whether keeping the machines in repair at the adjoining machine shop (R. 227-231) or repairing the machines during breakdowns at the mill (R. 95, 96, 101) with the operating staff of Waialua standing by waiting for repairs to be completed. All the repair work, wherever and whenever done, was an indispensable requisite to the continued and effective operation of the processing facilities (R. 94 *et seq.*).

The term "place of employment" as used in Section 7(c) has always been held to include the roads and railways over which raw materials are transported to the processing plant and finished products away from it, as well as to include the several separate buildings in which the processing operation and other incidental operations necessary thereto are carried on, if in fact the employer conducts such operations in several buildings. See cases and administra-

[49] The District Court therefore clearly erred in finding (R. 798; see also R. 212) that the work of the employees in connection with steam and power for use in performing the processing operations was not part of Waialua's processing operations (R. 85-86, 90, 216, 218).

tive interpretations discussed *infra*, pp. 68-72. The term "place of employment" cannot mean simply a single building, when the operation, of practical necessity, requires more than one building, but it must embrace the entire premises on which are located all the buildings required in the "processing of . . . sugar cane . . . into sugar".

Thus, the employees under consideration, such as those who repaired the processing facilities, stored Waialua's supplies, did laboratory or office work in connection with processing operations, or engaged in hauling sugar cane from the fields to the mill or in repairing the hauling facilities, were working in the "place of employment" within the meaning of the statute. The buildings in which they worked, including the mill, service shops, storage places for Waialua's supplies, and other buildings, were located in a small, compact and contiguous area of the plantation (P. 38, 721, 723), as all repair, laboratory, warehouse and shipping activities of Waialua took place within 300 feet of the mill building proper (R. 94, 723).

Of the several exemptions granted by Section 7(c),[41] some describe operations which, typically, an employer conducts alone and not in combination with other operations not described in Section 7(c), *e.g.*, processing sugar cane into raw sugar and molasses, ginning and compressing cotton, processing cottonseed, and canning or packing fresh fruits or vegetables. Other exemptions in Section 7(*c*) describe operations which, typically, an employer does conduct in combination with other operations not described in the section, *e.g.*, handling, slaughtering or dressing poultry or livestock. For example, a meat packer will not only handle, slaughter and dress livestock, but he will also cure meats, make sausage and perhaps manufacture dog food, soap, glue and industrial oils. Such non-described opera-

[41] Section 7(c) grants exemptions to the processing of various agricultural commodities. The Section is set forth in full text in Appendix D, p. 102, *infra*.

tions do not fall within the exemption. *Fleming* v. *Swift*, 41 F. Supp. 825 (N. D. Ill.). But, when the particular exemption involved is one of the former type, the exemption applies to all operations which are necessary to the described processing operations, even though not performed in a building where the actual processing takes place. Accordingly, the sugar cane processing exemption applies to all operations which are necessary to sugar cane processing, including the activities listed *supra*, p. 64.

B. The Foregoing Analysis Is Fully Supported by the Applicable Cases and Administrative Interpretations.

1. *Cases.*

Heaburg v. *Independent Oil Mill, Inc.*, 46 F. Supp. 751 (W. D. Tenn.) (exemption for processing cottonseed held to apply to all employees of a cottonseed mill, including watchmen, clerical employees, and employees handling and selling bagging and ties, most of which was used to wrap and bind lint cotton—a by-product of the mill's business—but some of which was sold to cotton ginners); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S. D. Calif.) (exemption for processing cottonseed held to apply to employees working in several buildings and structures, including a seed storage house, mill, cleaning house, oil tanks, laboratory, and others, and engaged in laboratory work of analyzing crude cottonseed oil, including some oil from other plants, cleaning the oil, loading oil into tank cars, hauling trash, doing general work, janitorial work, and unloading cottonseed received at the mill); *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 123 F. (2d) 387, 392 (C. C. A. 1) (opinion assumed that employees engaged in connection with hauling sugar cane to the employer's mill, including those repairing and maintaining the hauling facilities, but who did no work at the mill, were exempt under Sec. 7(c)); *Calaf* v. *Gonzalez*, 127 F. (2d) 934, 936-937 (C. C. A. 1) (opinion assumed that employees engaged in connection

with hauling sugar cane to the employer's mill were exempt under Sec. 7(c), including employees who did the following types of work: construction and repair of rolling stock, fireman, locomotive brakeman, splitting wood for engines, repairing main railroad line, signalling at grade crossings, and repairing railroad carts); *Byus* v. *Traders Compress Co.*, 59 F. Supp. 18 (W. D. Okla.) (Section 7(c) exemption for compressing cotton held applicable to pressers, truck drivers, and handy-men); *Walling* v. *McCracken County Peach Growers Ass'n.*, 50 F. Supp. 900 (W. D. Ky.) (Section 7(c) exemption for fruit packing held applicable to all employees of a fruit packing cooperative, including those who placed lids on the baskets in which the fruit was packed, those who labeled and stamped the baskets, clerical and supervisory employees, timekeepers, mechanics and watchmen); *Shain* v. *Armour*, 50 F. Supp. 907, 913 (W. D. Ky.) (Sec. 7(c) dairy products exemption held applicable to employees transporting cream to the employer's plant); *McComb* v. *Del Valle*, 80 F. Supp. 945 (D. Puerto Rico) (Sec. 7(c) sugar processing exemption held applicable to employees storing raw sugar in warehouses located 400 feet from the mill building proper); *McDaniel* v. *Clavin*, 128 P. (2d) 821, *aff'd* 22 Calif. (2d) 61, 136 P. (2d) 559 (Section 7(c) exemption for handling, slaughtering and dressing poultry held applicable to an employee picking up poultry at warehouses and delivering same to defendant's poultry plant, making deliveries to defendant's customers, opening cases of frozen poultry, dressing poultry, cleaning the premises, etc.)

The cases relied on by the District Court (R. 803, 804) are not in point. In each of those cases the employer was engaged not only in an operation which was exempt under Section 7(c) but also in other operations which were not exempt under Section 7(c) or under any other provision of the Act. Each of those cases held that the exemption was limited to employees whose activities related to the exempt operation, and held further that the exemption did not ex-

tend to employees whose activities related in whole or in part to non-exempt operations.[42] The principle of those cases is not applicable to Waialua. The operations of Waialua, in so far as they constituted the production of goods, were confined to (a) growing sugar cane and (b) processing same into raw sugar and molasses.[43] Waialua therefore was not engaged in any non-exempt operations.

2. *Administrative interpretations.*

(a) "The exemption thus granted to cottonseed processing differs from that granted in the same section of the Act to certain operations upon livestock. The latter exemption appears limited to certain particular operations, since Sec. 7(c) does not use any term descriptive of the meat packing industry, but uses only words describing certain particular operations in such industry. With this distinction in mind *it appears to us that all employees working in a plant engaged in processing cottonseed are within the exemption,* while this would not be true of all employees working in a plant engaged in handling, slaughtering or dressing livestock. In the latter case only the employees engaged in the enumerated operations or in operations that are an integral part thereof would be exempt" [Emphasis supplied]. *Opinion Letter of Department of Labor* written on July 9, 1941, set forth with approval in *Abram* v. *San Joaquin Cotton Oil Company,* 49 F. Supp. 393, 401 (S. D. Calif.).

(b) "*It should be noted, however, that a 'place of employment', although constituting only one establish-*

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[42] For example, in *Walling* v. *Bridgeman-Russell Co.,* (D. Minn.) 6 Labor Cases ¶ 61,422, the employer at his place of business not only was engaged in the first processing of milk and cream into dairy products, but he was also wholesaling eggs, fountain supplies, frosted foods, meats and other commodities and he was making ice cream mix and ice cream. The exemption was accordingly limited to those employees working in the first processing of milk and cream into dairy products.

[43] The incidental activities of Waialua with respect to its plantation housing are discussed in Point VI, *infra.*

ment, may contain several buildings in which the exempt operations are performed.

". . . truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment', for they make regularly recurring trips to and from the establishment and may be deemed attached thereto. Further, some of their work, such as loading and unloading, takes place in the establishment." [Emphasis supplied] (*Interpretative Bulletin No. 14*, ¶ 22, *WHM* 35:360-361)

(c) "*Therefore, when an establishment is exclusively engaged in activities enumerated in the section [Sec. 7(c)], all of the employees of the operator of the establishment who work solely in that establishment, including office employees, watchmen, maintenance workers and warehousemen, come within the scope of these exemptions. In such a situation, the exemptions also apply to those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant*" [Emphasis supplied]. *WMH* 35:551

(d) ". . . where an establishment is *solely* engaged in the packing of fresh fruits or vegetables and refrigerator cars are spotted on tracks adjoining the plant, the employees of the packer engaged in bunker icing or in cooling cars solely for use in shipping fresh fruits and vegetables packed in that establishment are exempt" [Emphasis supplied]. *WHM* 35:554.

(e) "If the plant is used *solely* to pack fresh fruits and vegetables, the assembling of box shook by employees of the packer is exempt when performed during the active season *solely in the packing plant or in a warehouse located on the same premises*" [Emphasis supplied]. *WHM* 35:554.

(f) In a press release answering certain questions about the application of the Sec. 7(c) exemption to

canneries, the Department of Labor pointed out that a truck driver engaged solely in transporting canned citrus from a cannery to market was within the exemption and must be regarded as employed in those portions of the establishment devoted by the employer to the operations described in Sec. 7(c), *i.e.*, the canning of fresh fruits and vegetables. *WHM* 35:763.

(g) Employees of a sugar mill engaged in transporting by truck raw sugar from the sugar mill to the company's warehouse seven miles away are exempt under Sec. 7(c). *WHM* 35:769.

(h) By letter dated March 18, 1941, the Department held that the Sec. 7(c) exemption applies to pea vining stations in the fields if the work performed at the vineries and the cannery, to which vined peas are thereafter removed, is performed as part of a continuous series of operations throughout which the peas remain perishable. 3 *C. C. H. Labor Law Reporter*, ¶ 25,250.32.

(i) The removal of beet pulp residue from a sugar beet mill is a necessary incident to the production of sugar and hence within the Section 7(c) exemption for the processing of sugar beets into sugar or syrup. *WHM* 35:770-771.

(j) The Section 7(c) exemption for the first processing and canning of fresh fruits or vegetables applies to the making of cattle feed and molasses by a citrus canner from citrus waste as a part of a continuous series of operations starting with the fresh fruit. *WHM* 35:556.

(k) The Sec. 7(c) exemption for processing cottonseed applies not only to the oil mill in which the cottonseed is crushed but also to a storage house, in which hulls removed from the cottonseed and cottonseed meal are stored. *WHM* 35:772-773.[44]

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[44] Additional administrative interpretations in accord with the above are set forth in Appendix D, pp. 102-103, *infra*.

VI.

THE EMPLOYEES WERE NOT "ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE" WHEN THEY WERE ENGAGED IN (i) REPAIRING AND MAINTAINING WAIALUA'S DWELLING HOUSES LOCATED ON WAIALUA'S PLANTATION, AND (ii) FURNISHING, MAINTAINING, REPAIRING OR SERVICING RELATED DOMESTIC SERVICES OR FACILITIES (FIREWOOD, WATER, ELECTRICITY, BATH HOUSES, SEWAGE DISPOSAL, STREET MAINTENANCE AND CLEANING, PARKS AND PLAYGROUNDS, CLUBHOUSE AND OTHER RECREATIONAL FACILITIES) TO OR FOR THE LESSEES OF SUCH DWELLING HOUSES WHO INCLUDED BOTH EMPLOYEES OF WAIALUA AND OTHERS; BUT ASSUMING THAT THEY WERE "ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE" WHILE PERFORMING SUCH WORK, THEY WERE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT UNDER SECTION 13(a)(6).

The Court of Appeals correctly concluded that the employees were not engaged in interstate commerce or in the production of goods for interstate commerce when performing dwelling repairs and maintaining related domestic facilities in the plantation villages (R. 735-736).

A. The District Court's Holding That Such Employees Were Engaged in the Production of Goods for Commerce (R. 805-817) Was Based Upon a Series of Findings Which Are Contrary to the Undisputed Facts in the Record.

All the evidence in the record bearing upon the issue appears in the Stipulation or amendment thereto (R. 118-122, 136-138, 164-167, 174-175, 180-181, 721, 722, 724; Stip. pp. 744, 759, 768, 770)[45] and in the oral testimony of the employees (R. 403-614). The material facts revealed by such evidence are:

1. *Housing maintenance and services.* When Waialua's predecessor company was organized in 1898, there was no

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[45] The pagination in the Stipulation referred to is the pagination in the Stipulation as originally filed in the District Court and not the re-numbered pagination of the Stipulation contained in the Certified Transcript.

established community having housing or other services or facilities for living in or near the area which it proposed to devote to the production and processing of sugar cane. Consequently, it became necessary for the company over a period of years to construct houses, develop services and otherwise establish facilities for permanent living on the plantation *to serve the needs* of the required number of employees and their families (R. 118). The principal plantation community was established around the plantation buildings and yard area and came to be known as the village of Waialua (R. 119, 721).

Waialua village, which is located within the city limits of Honolulu (R. 31), has all the physical and visual characteristics of an established community and is similar to a typical small village or town of a farming community center. The area is criss-crossed with government roads and highways and also roads and highways constructed and maintained by Waialua (R. 121, 722).

After the plantation was established and continued to operate, there gradually grew up an independent community now known as the village of Haleiwa, which is located off the edge of the plantation, about one mile from the village of Waialua (R. 119). Haleiwa is a small business and residential community made up of privately owned residences and typical small retail and service establishments. Haleiwa caters to Waialua's employees and to surrounding community residents, who include persons working at other locations on the Island of Oahu, residents of numerous beach houses, and Army and Navy personnel using beach recreational facilities. To some extent the village of Haleiwa has become integrated with the village of Waialua with common fire protection equipment and public police patrol officers serving both communities (R. 122).

No employee of Waialua, including each employee herein, is required as a condition of employment to live on the plantation or in plantation houses or to use any service or

facility which Waialua furnishes or renders its employees (R. 120). Some employees of Waialua, including some of the employees here involved (R. 601), live off the plantation and in houses not owned or supplied by Waialua (R. 428-429, 430, 433). The relationship existing between Waialua and its employees living in plantation houses is that of landlord and tenant; employees pay cash to Waialua for facilities and other services furnished them (R. 119, 120).[46]

2. *Clearly erroneous findings by the District Court.* The undisputed facts in the record are markedly contrary to the findings of the District Court.

(a) The Stipulation shows that the reason why Waialua constructed houses and developed services and living facilities for its employees was that there was no community with such facilities near the area which Waialua proposed to devote to the production and processing of sugar cane (R. 118). There is no evidence whatever supporting the District Court's finding that the houses and other living facilities were constructed and developed in order to establish a stable labor supply (R. 776, 810, 814); nor is there any evidence to show that Waialua's labor supply has in fact been stabilized by the establishment of the community.

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[46] Prior to November 1946, the employees of Waialua who lived in Waialua's dwelling houses received such facilities and services as part of their regular compensation (R. 118, 119). By the collective bargaining agreement, the wage provisions of which were effective on November 19, 1946 (R. 135, 136-137), this perquisite system was abolished, the value of the perquisites previously allowed being converted into cash wages and the employees in turn paying cash for facilities and services furnished them (R. 119, 136-137; Stip., p. 768). Contrary to the District Court's finding (R. 811), there is nothing in the record to show whether after this conversion the employees paid back to Waialua the same amounts as rental as they had previously been allowed in perquisites or whether they paid a different amount.

(b) There is no evidence to support the District Court's finding that Waialua's "villages" are isolated communities and insulated from the rest of the Territory or situated miles from any city (R. 810). The Stipulation shows, to the contrary, that the plantation is within the limits of the City and County of Honolulu (R. 31); that Waialua village is adjacent to the built-up community of Haleiwa (R. 119, 122, 721); and that there are main highways running through the village area on which employees may easily travel to and from nearby communities (R. 64, 722).

(c) The District Court's finding that the employees have no choice as to whether they will live in a house owned by Waialua (R. 814; see also R. 810) is also clearly erroneous. The employees' own witness testified that Waialua's employees do have a real choice or opportunity to purchase or rent homes in the community not owned or supplied by Waialua (R. 428-429, 430, 433; and see also R. 601). Moreover, the Stipulation shows that during the workweeks in issue, no employee was required as a condition of employment to live in a Waialua-owned house (R. 120), and that in fact some employees lived off the plantation in houses not own or supplied by Waialua (R. 121).

(d) Nothing in the evidence sustains the District Court's finding that the making of dwelling repairs and the maintenance of related domestic facilities are necessary to Waialua's production operations (R. 815); or that without such work Waialua's employees could not occupy the dwelling houses and there would be a marked interference with the production of goods for commerce (*id.*); or that Waialua undertook in its collective bargaining agreement (R. 129 *et seq.*) to provide dwelling maintenance and repairs and village services (R. 781, 811).

(e) The District Court's statement that rental of houses to non-employees is negligible (R. 811) is contrary to fact. Of the 3373 persons who live on the plantation, 421 are

lessees and their families who are not employed by Waialua (R. 120-121).

The District Court's key findings of fact were therefore clearly erroneous, and may be set aside under Rule 52(a), *Fed. Rules Civ. Proc.*, 28 U. S. C. A. Without such erroneous findings, the District Court's conclusion of law as to coverage of the employees is wholly unwarranted.

B. The Employees Were Not "Engaged in Commerce" While Performing Such Work.

The employees have conceded that while performing such work they were not "engaged in commerce". This concession was compelled by *McLeod* v. *Threlkeld*, 319 U. S. 491.

C. The Employees Were Not "Engaged . . . in the Production of Goods for Commerce" While Performing Such Work.

Section 3(j) of the Act, as it was worded during the period involved herein, provided that an employee was engaged in the production of goods if he was employed in "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof . . ." The pertinent words were "in any . . . occupation necessary to the production" of goods.

In order for activities to be "necessary to the production" of goods, the activities must have a "close and immediate tie with the process of production", not merely a "tenuous relation" to such process. See *Kirschbaum* v. *Walling*, 316 U. S. 517, 525. The problem is essentially one of degree as to the number of "steps removed from the physical process of the production of goods". *See 10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 578, 583; *cf. Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16. And in applying this standard, this Court has emphasized that Congress in enacting this statute "plainly indicated its purpose to leave local business to the protection of the States", *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564,

570; *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574,[47] and "did not see fit, as it did in other regulatory measures, *e.g.*, the Interstate Commerce Act . . . and the National Labor Relations Act, . . . to exhaust its constitutional power over commerce." *10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 578, 579; *McLeod* v. *Threlkeld*, 319 U. S. 491, 493.[48]

We submit that such work did not have such a "close and immediate tie with the process of production" of goods for interstate commerce as to be necessary to such production. The District Court's conclusion to the contrary (R. 805-817) is opposed by all the precedents involving employees in comparable work. *Wilson* v. *R. F. C.*, 158 F. (2d) 564 (C. C. A. 5), *cert. den.* 331 U. S. 810; *Coomer* v. *Durham*, 93 F. Supp. 526 (W. D. Va.); *Morris* v. *Beaumont Mfg. Co.*, 84 F. Supp. 909 (W. D. S. C.).

The following factors placed the employees beyond the scope of the Act:

First, the employees were employed on houses, facilities and services which were not themselves produced for or shipped in interstate commerce, nor were they used in or devoted to the production of goods for interstate commerce. They merely "serve[d] the needs" of the employees, as the parties stipulated (R. 118), when their occupants were *not* engaged in such production at all, but were wholly separated therefrom in space and function. Such

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[47] S. Rep. 884, Committee on Education and Labor, 75th Cong., 1st Sess., states: "The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to States and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce" (p. 5).

[48] The Hawaiian legislature has imposed its own wage and hour requirements with respect to the services in question. *Revised Laws of Hawaii*, 1945, Title 9, Ch. 75, Sections 4351-4366.

services were as remote from production for commerce as if provided in a village not owned by Waialua.

Second, they worked on homes the occupancy of which was optional with the production employees, including each employee herein (R. 120). The employees could live anywhere they chose, whether on or off the plantation. There were other nearby communities where they could live. The District Court's findings to the contrary, as we have shown, are in conflict with the evidence.

Third, there is no evidence to show that the making of dwelling repairs and the maintenance of related domestic facilities were necessary to Waialua's production operations during the period in issue, or that such operations were any more efficient because the employees did live on the plantation, or that those employees living off the plantation were any less efficient than those living on the plantation.

The village maintenance work here involved is therefore far removed from activities held "necessary to" production of goods for commerce in such cases as *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Borden Co.* v. *Borella*, 325 U. S. 679; and *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13. Such village maintenance employees are likewise further removed from production for commerce than the maintenance employees of an operator of a 48-story office building in New York, held excluded from coverage in *10 East 40th St. Bldg., Inc.* v. *Callus*, 325 U. S. 578, although the maintenance employees there involved actually furnished services to facilitate the tenants' interstate businesses during office hours. Here, however, the employees were merely satisfying personal needs of employees viewed as a part of the general consuming public and not as employees. The village is really a municipality, with all the physical characteristics of one and containing the usual buildings and establishments found in a municipality.

The essentially local work performed by the employees in repairing dwellings and maintaining related domestic

facilities is as remote from interstate commerce as the activities of plumbers, carpenters, electricians, housepainters and others in local trade in innumerable villages, towns and cities in the United States. The only difference is that here the employees were employed by the producer of goods for commerce—a difference which is not relevant in applying the commerce coverage of the Act, since such coverage is based upon the activities and work of the individual employee and not upon the business of his employer. See *Kirschbaum* v. *Walling*, 316 U. S. 517, 524; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571-572; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 184-185. To bring these employees within the coverage of the Act is to wipe out entirely the distinction between local and interstate activities and to sweep under the Act those essentially local activities which Congress intended to leave to the protection of the States.[49]

D. Assuming That the Employees Performing Such Work Were Engaged in "Commerce or in the Production of Goods for Commerce", They Were Exempt From the Overtime Provisions of the Act by Virtue of Section 13(a)(6).

If the work here in question was within the commerce coverage of the Act, then by the same token, such work was exempt under Section 13(a)(6). If the housing ac-

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[49] The cases relied upon by the District Court (R. 806-810) are inapposite. The cookhouse cases (*Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101 (C. C. A. 9) and *Hanson* v. *Lagerstrom*, 133 F. (2d) 120 (C. C. A. 8)) were based upon this Court's decision in *Phila., B. & W. R. Co.* v. *Smith*, 250 U. S. 101. But shortly after the cookhouse cases were decided, this Court specifically held the *Smith* case inapplicable to coverage of the Fair Labor Standards Act. *McLeod* v. *Threlkeld*, 319 U. S. 491, 496. The cafeteria cases (R. 808-810), which are in conflict with each other, are also distinguishable because, unlike the situation in them, the employees in the instant case, who repaired houses and maintained related domestic facilities, "serve[d] the needs" of the production employees (R. 118) only when the latter were completely separated in space and function from the production of goods for commerce.

tivities of employees of Waialua are so related to the growing, cultivation, harvesting and processing of sugar cane that they are necessary for the production of goods for interstate commerce, they must necessarily constitute practices which are either incident to or in conjunction with Waialua's growing, cultivation, etc., activities.

This is shown by a comparison of the crucial statutory language defining the coverage of the Act on the one hand and the agriculture exemption on the other. Whether the making of dwelling repairs and the maintenance of related domestic facilities were necessary to the production of goods for commerce is determined by the definition of "produced" contained in Section 3(j). During the period here involved, such definition read:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in *any process or occupation necessary to the production* thereof, in any State" [Emphasis supplied].

Whether such work came within the agriculture exemption in turn depends upon the definition of agriculture contained in Section 3(f). Such definition reads in relevant part:

> "'Agriculture' includes . . . *any practices* (including any forestry or lumbering operations) performed by a farmer or on a farm as an *incident to or in conjunction with such farming operations* . . ." [Emphasis supplied].

In order to hold the work in question covered by the Act the Court must necessarily find that such work is *necessary* to the growing of Waialua's sugar cane and its processing. On the other hand, in order to bring such work within the agriculture exemption, the Court need only conclude that it is carried on by Waialua as an *incident to or in conjunction with* Waialua's farming operations. It would be un-

reasonable to hold that Waialua's growing and processing of sugar cane are so dependent upon its dwelling repairs and maintenance of related domestic facilities as to make the latter necessary to such growing and processing of sugar cane, without at the same time holding that the dwelling repairs and maintenance of related domestic facilities are incident to or in conjunction with the sugar cane growing and processing.

VII.

ANY EMPLOYEE, WHO IN A WORKWEEK PERFORMED WORK WHICH WAS EXEMPT UNDER SECTION 13(a)(6) OR SECTION 7(c), AND DID NOT DEVOTE A SUBSTANTIAL PART OF HIS TIME IN THE SAME WORKWEEK TO AN ACTIVITY WHICH WAS NOT SO EXEMPT, WAS EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT DURING THAT WORKWEEK.[20]

We have contended above that all the work performed by the employees during the workweeks covered by the litigation was exempt under either Section 13(a)(6) or Section 7(c). But if this Court is of the view that some of the activities of the employees were not exempt under Section 13(a)(6) or Section 7(c), it becomes material to ascertain the extent to which an employee may engage in nonexempt work in a workweek without losing the exemption otherwise applicable to him during that workweek.

The District Court evidently took the position that an employee, whose other work in a workweek was exempt

[20] In situations, where in the same workweeks employees performed both work that was not sufficiently close to commerce or to the production of goods for commerce to be considered covered by the Act at all, and work that was exempt under Section 13(a)(6) or Section 7(c), they were obviously excluded from the overtime provisions of the Act. The Department of Labor is in accord. WHM 35,708. The rule is the same with respect to an employee who worked part of the workweek in an activity deemed exempt under Section 13(a)(6) and the remainder in an activity deemed exempt under Section 7(c). 3 CCH Labor Law Reporter, ¶ 24,105.27. There is no issue presented herein with respect to these propositions.

under Section 13(a)(6) or Section 7(c), lost the exemption for the entire week if he devoted any part of his time, however insignificant, to a nonexempt activity during the same workweek (R. 817-819).[51] We submit that this ruling is unnecessarily harsh and renders meaningless for all practical purposes the exemptions provided by Section 13(a)(6) and Section 7(c). On most farms there is no such thing as the complete segregation of employees and activities. An employee will perform whatever duties are necessary to the farm's operations. But if the agriculture exemption in the Act is to be narrowly construed so that many activities performed on the farm are to be deemed non-exempt, then under the ruling of the District Court the agriculture exemption is of no avail to the farmer. The District Court's ruling means that in performing the operations necessary and indispensable to farming, the exemption is lost. And the same result follows with respect to the processing exemption provided by Section 7(c).

We submit, therefore, that Congress intended the exemption to apply to an employee in any workweek in which he does not devote a *substantial part* of his time to an activity not exempt under Section 13(a)(6) or Section 7(c). This rule takes cognizance of the realities of a farmer's or processor's operations. Moreover, it comports with the rules laid down by the Department of Labor with respect to many other exemption provisions in the Act. In the case of the exemptions for executives; administrative employees; professionals; local retailing capacity employees; and outside salesmen; retail establishments;[52] seamen;

[51] The Court of Appeals did not pass upon this point, since it took the position that each employee was totally exempt from the Act under Section 13(a)(6) in each workweek covered by the litigation (R. 746, note 45).

[52] With respect to the Section 13(a)(2) retail establishment exemption, the Department of Labor allowed a tolerance of 25% of non-exempt work in a workweek without loss of the exemption. The Department did this under such exemption prior to its amend-

carriers by air; fishery employees; local newspapers; street and suburban railways and local trolley and motor bus operators; switchboard operators; taxicab operators; employees engaged in forestry or lumbering operations; and employees of employers subject to Part I of the Interstate Commerce Act, the Department has permitted a tolerance of non-exempt work ranging from 20% to 49.999%. The Department has specifically said that these percentages of non-exempt work are insubstantial. The Department's rulings concerning these several exemptions are detailed in Appendix E, pp. 104-105, *infra*.

The reason for allowing a tolerance of nonexempt work in the case of exemptions is that many employees in occupations intended by Congress to be exempt under one or another of the exemption provisions perform some duties which do not strictly fall within the literal language of the exemption provisions. A failure to allow some tolerance therefore would result in so widespread a denial of the exemption provisions as to substantially defeat the Congressional intention in enacting them. This reason applies equally to the Section 13(a)(6) and 7(c) exemptions particularly in view of the breadth that Congress intended to accord such exemptions.

CONCLUSION IN NO. 358.

For the reasons stated in the argument in No. 358, the judgment of the Court of Appeals should be reversed, with appropriate directions.

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ment by the Fair Labor Standards Amendments of 1949 (63 Stat. 910), which specifically established a 25% tolerance of nonexempt work for retail establishments. The courts have repeatedly sanctioned the tolerance test. *Harris* v. *Hammond*, 145 F. (2d) 333, 334 (C. C. A. 5) *cert. den.* 324 U. S. 859; *Northwestern Hanna Fuel Co.* v. *McComb*, 166 F. (2d) 932, 937-938 (C. C. A. 8); *Brown* v. *Minn-Gas Co.*, 51 F. Supp. 363, 371 (D. Minn. 1943).

CONCLUSION IN NO. 357.

For the reasons stated in the argument in No. 357, the judgment of the Court of Appeals should be modified specifically (a) to set aside the judgment of the District Court; (b) to dismiss the counterclaim on the merits; (c) to adjudge, declare and decree that the petitioner-employees, while engaged in repairing dwellings and maintaining related domestic facilities on Waialua's plantation during the work-weeks in issue, were not engaged in commerce or in the production of goods for commerce; and (d) to adjudge, declare and decree that all the petitioner-employees were exempt from the overtime provisions of the Act during the work-weeks in issue by virtue of Section 13(a)(6) or Section 7(c) thereof.

Respectfully submitted,

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APPENDIX A.

Activities Engaged in By Each Employee.

1. *Field work and repair and maintenance of field equipment:* (i) preparation of land for planting, planting, ratooning, cultivation, fertilizing, irrigation, harvesting, and maintenance of field roads (Maneja, Asuncion, Hayashi, K. Okouchi, Watanabe (R. 191-204) and Crisostomo (R. 279-283)); (ii) repair, servicing, and maintenance of field equipment and implements, such as tractors, tractor auxiliary implements, caneloading machines, and pumps and other irrigation equipment (employees last mentioned and also Ezawa (R. 231-235), Reyher (R. 239-243), A. Robello (R. 273-276), Tanaka (R. 227-231), Takata (R. 243-248), Hironaka (R. 266-273), Yamada (R. 277-278), and Sunahara (R. 223-226)).

2. *Hauling and repair and maintenance of hauling equipment:* (i) hauling by narrow gauge railroad of sugar cane from fields to mill (Holmberg (R. 205-206)); (ii) hauling by truck on field roads of laborers and field supplies and equipment used for planting, cultivation and harvesting (Guigui (R. 235-239), Vierra (R. 248-256), and Crisostomo (R. 279-283)); (iii) miscellaneous hauling such as hauling by truck of laborers, supplies, and equipment to different places on plantation (Guigui (R. 235-239), Vierra (R. 248-256), and Crisostomo (R. 279-283)) (some of this latter type of hauling consisted of hauling from off the plantation to places on the plantation); (iv) repair, servicing, and maintenance of hauling equipment and facilities such as cane cars, locomotives, trucks, and the plantation railroad, including portable tracks (K. Okouchi (R. 198-201), Holmberg (R. 205-206), Faria (R. 206-208), Sera (R. 208-210), T. Okouchi (R. 210-212), Claunan (R. 220-223), Sunahara (R. 223-226), Tanaka (R. 227-231), Takata (R. 243-248), Mori (R. 264-265), Hironaka (R. 266-273), and A. Robello (R. 273-276)).

3. *Sugar Cane Processing and Repair and Maintenance of Processing Equipment:* (i) Processing of sugar cane at

mill and temporary storage, loading, and shipment of raw sugar and molasses (Hernandez, Dumlao, Kondo, Cumlat, Lazo, and Kubo (R. 310-317), Carrit and S. Robello (R. 216-220), and Hamamoto (R. 317-318)); (ii) repair, servicing, and maintenance of mill and its equipment (employees last mentioned and also Oato (R. 212-216), Sunahara (R. 223-226), Tanaka (R. 227-231), Takata (R. 243-248), and Hironaka (R. 266-273)).

4. *The making of concrete irrigation flumes*, water supply pipe, blocks, and other concrete products required for use on the plantation (Tsutsui (R. 257-258)).

5. *Storage of supplies and equipment* for field, hauling, mill, and repair activities of Waialua (Yack Chun Lee (R. 318-319)).

6. *Laboratory work* for (i) field operations of Waialua (Pacheco (R. 285-286)) and for (ii) hauling, processing, and activities referred to in "8", *infra* (Fujiwara (R. 286-288)).

7. *Office work* (Sakaguchi (R. 319-320)).

8. *Repair and maintenance of Waialua's dwelling houses* and the furnishing, maintaining, repairing, or servicing of related domestic services or facilities to or for the lessees of such dwelling houses (Sakai (R. 256-257), Kashiwabara (R. 259-263), Mori (R. 264-265), Yamada (R. 277-278), Fernandez (R. 234), Crisostomo (R. 279-283), Oato (R. 212-216), Hironaka (R. 266-273), Guigui (R. 235-239), and Vierra (R. 248-256)).

Certain employees performed work in only one group of activities in every workweek and are therefore listed only in that group. Other employees who are listed in several categories performed one group of activities exclusively in some workweeks, but in other workweeks performed a substantial amount of work in two or more groups of activities. Still other employees appearing in several groups did a substantial amount of work in many workweeks which

fell into several groups, and in no workweek did work that fell into one group exclusively. In various instances employees who did only minor amounts of work within a particular group of activities are not listed above as within the group. Complete information as to the work done by all of the employees within the various groups appears in the District Court's findings of fact (R. 190 *et seq.*, 308 *et seq.*).

APPENDIX B.

Legislative History of Sections 13(a)(6) and 3(f).

1. *Statement of Senator Schwellenbach that packing by a farmer of his own grown apples was exempt under the bill.*

> "When an apple grower picks his apples and takes them into his own warehouse . . . and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is *no dispute about the fact that it is an agricultural* operation. . . . It seems to me that the bill, under the definitions as they now stand, places at a considerable disadvantage the man who is too small an operator to perform these operations upon his own farm . . .The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes" [Emphasis supplied] 81 Cong. Rec. 7659.

To reach the situation about which he was complaining, Senator Schwellenbach later introduced an amendment to provide an exemption for persons employed within the area of production "in preparing, packing, or storing . . . fresh fruits or vegetables in their raw or natural state" (*Id.*, p. 7876). This amendment was adopted (*Id.*, p. 7949).

2. *Debate in Senate on processing of sugar cane.*

> "Mr. Overton. Let me invite the attention of the Senator to another agricultural industry in connection with which the processing, if it may be so called, by the farmer of his own product is much more general than in the case of the farmer ginning his own cotton. I refer to the sirup-cane producer who processes his own cane, grinds it, and makes it into sirup. Does he come within the provisions of the bill?
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> * * * * * * * * * *
>
> "Mr. Black. The Senator can read the definition in *the bill and note that those things ordinarily done by*

farmers on the farm do not come under the provisions of the bill.

"Mr. Pepper. Mr. President, I wonder if the following language would not answer the questions of the Senator from Louisiana. It is found on page 51 of the bill, lines 13 and 14, being a part of the agricultural definition: 'And any practices ordinarily performed by a farmer as an incident to such farming operations.'

"Mr. Overton. It may and it may not. I was asking the Senator from Alabama because he is the author of the bill, and I was giving a concrete case . . . I have taken the case of a farmer who *plants his sugarcane, gathers it, and who on his own farm has a sirup mill and converts the juice of the cane into sirup. Does he come within the provisions of the bill?*

"Mr. Black. *The definition provides that those things done by the farmer ordinarily on his farm* constitute a part of his farming business. It would *depend upon whether or not that was an ordinary incident to that type of farming business in the State where sirup is made. If so, that would be agriculture under the definition of the bill.*

* * * * * * * * * * *

"Mr. Overton. It would not be considered an ordinary practice performed by a farmer as an incident to his farming operations for the reason that we also have large sirup mills. Such sirup mills gather in the cane produced by the different farmers and process it into sirup. But it is of frequent occurrence that a farmer has a mill on his own farm and converts his own cane juice into sirup. With that explanation, would the Senator say the practice of such a farmer is one ordinarily performed by a farmer as an incident to his farming operations?

"Mr. Black. If the Senator says it is a practice not ordinarily performed by a farmer as incident to his farming operations, I would necessarily say it was a practice not ordinarily performed by a farmer as incident to his farming operations, and therefore would not come under the definition. I am assuming it is a practice which is not ordinarily engaged in, by farmers.

"Mr. Overton. Not altogether engaged in, but frequently engaged in by farmers.

"Mr. Black. For instance, a farmer might build on his farm a factory for the purpose of manufacturing shirts and sending them throughout the United States. Since that is a practice not ordinarily engaged in by farmers on their farms, naturally that would not be considered a farming activity.

"Mr. Overton. *Let us take the sugar manufacturer. On some plantations there are mills in which the planters may manufacture their own cane into sugar. Would they come within the provision of the bill?*

"Mr. Black. *As I said, it would depend upon whether or not that comes within the definition under the facts of operation, whether it is a necessary incident to that type of cane farming. I am not sufficiently familiar with it as it exists in the Senator's State of Louisiana to be able even to venture an opinion.*

"Mr. Overton. As I understand the Senator, in cases where some farmers process their own products and other farmers carry their products to some processor to be processed, then by reason of the fact that some farmers carry their products to a processor to be processed, the farmers who process their own products would not be considered as engaging in a practice which is ordinarily incident to farming operations.

"Mr. Black. I could not say as to that. It depends altogether on the facts as to what is a necessary incident to farming. As I said, there are some things so far removed from farming that all of us would know instantly they did not constitute a farming operation. The illustration I gave was of a farmer erecting on his farm a factory and manufacturing anything you please, whether something he grows or not, who employs many people to manufacture it, and then ships it in interstate commerce. The mere fact that he has such a plant on his farm would not make the manufacturing of shirts, for instance, a farming operation. It would still be a manufacturing operation. The same reasoning would apply to any other process of manufacturing" [Emphasis supplied]. 81 Cong. Rec. 7657-7658.

3. *Debate on Senator McGill's amendment to provide that the agriculture exemption should apply (1) to prac-*

tices performed on a farm as an incident to farming operations and (2) to "delivery to market."

"Mr. McGill. Mr. President, the purpose of the amendment is to broaden the definition of 'employee' as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing [sic] machine outfit and employs a crew and is employed by a farmer to thrash [sic] his wheat might be included under the provisions of the bill. *Likewise, those who are engaged in harvesting and delivery to market might be included.* It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

* * * * * * * * * *

"Mr. George. Is it the purpose of the amendment to exempt those who thresh grain?

"Mr. McGill. Those who thresh grain, who harvest grain and *deliver it to market.*

"Mr. George. Would the amendment also *apply to the harvesting of any other crop?*

"Mr. McGill. *It would apply to any commodity produced on a farm.*

"Mr. George. Would it apply to peanut pickers who pick in the fields?

"Mr. McGill. Yes.

"Mr. George. *And who move peanuts to the market?*

"Mr. McGill. *Yes;* that is my understanding.

"Mr. George. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

"Mr. Black. *That is my interpretation of the amendment,* and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

"Mr. George. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from

Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

"Mr. Black. *Unquestionably.*

"Mr. McGill. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, *so long as it is incidental to agricultural purposes.*

"Mr. George. *And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop.* Is that true?

"Mr. McGill. *That is true; and the language would also include all labor performed in making delivery to market.*

"Mr. George. I thank the Senator.

"Mr. Copeland. Of course, that would take care of my apple man, about whom I have been worrying, would it not? *It would take care of the farmer who takes his crop of apples to the market, would it not?*

"Mr. McGill. That is correct. [Emphasis supplied]. 81 Cong. Rec. 7888.

4. *Debate on amendment proposed by Senator McAdoo.*

Senator McAdoo proposed an amendment, substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

"Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits." 81 Cong. Rec. 7927.

The following discussion ensued:

"Mr. McGill. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word 'farmer', the words 'or on a farm', and also by inserting in line 14, after the word 'operations', the words 'including

delivery to market', *it being the purpose of these amendments to exclude from the bill all labor performed on a farm*, whether by contract with the farmer or otherwise, and to *exclude all labor connected with the delivery to market of commodities produced on a farm* . . .

* * * * * * * * * * *

". . . I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday, such as mentioning harvesting, packing, and operations of that character. *The amendment adopted yesterday was intended to include, and I think, it does include, all kinds of labor performed on a farm and all kinds of labor in connection with delivering agricultural products to market.* In my judgment it includes more than does the amendment proposed by the Senator from California and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California by virtue of the narrower terms carried in it, will be rejected. . . .

"Mr. George. I suggest to the Senator from California that, in my opinion the amendment offered by the Senator from Kansas [Mr. McGill] yesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

"I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind" [Emphasis supplied]. *Id.*, pp. 7927, 7928-7929.

5. *Debate on Conference Report between Senator Thomas and Senator Johnson.*

"Mr. Johnson of California. *I take it from what the Senator has said that the agricultural exemptions are practically plenary, and take in almost all agricultural products.*

"Mr. Thomas of Utah. *I could not hear part of the Senator's sentence.*

"Mr. Johnson of California. *I said that, in general language, agriculture is exempted from the operation of the bill.*

"Mr. Thomas of Utah. *It is.*

"Mr. Johnson of California. *Does the Senator know of any particular kind of agriculture that is included in the bill?*

"Mr. Thomas of Utah. *I do not know of any. The definition seems to be all-inclusive, and we tried to make it so*" [Emphasis supplied]. 83 Cong. Rec. 9162-9163.

APPENDIX C.

Department of Labor Interpretations of Sections 13(a)(6) and 3(f).

1. *Interpretative Bulletin No. 14* (*WHM* 35:351-366).

"Production, Cultivation, Growing, and Harvesting of Any Agricultural or Horticultural Commodities"

"5. (a) . . . The term 'harvesting of any agricultural or horticultural commodities' includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position in the field, greenhouse, etc."

* * * * * * * * * * *

"Practices . . . Performed by a Farmer"

"10. . . . It should be noted with respect to all of these practices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. It makes no difference whether they are performed on or off the farm if performed by a farmer. . . .

"When a farmer is engaged in these practices on agricultural or horticultural commodities grown on other farms as well as his own, as for example, when he cans tomatoes which come both from his farm and from the farms of others, such operations do not seem to be incident to or in conjunction with his farming operations. In our opinion such operations assume the aspect of an independent business and do not fall within this exemption."

* * * * * * * * * * *

"Preparation for Market (Performed by a Farmer)"

"(b) The term 'preparation for market' must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

1. *Grain, seed, and forage crops.*—Weighing, binning, stacking, cleaning, grading, shelling, sorting, packing, and storing.

2. *Fruits and vegetables.*—Assembling, binning, ripening, cleaning, grading, sorting, drying, preserving, *packing*, storing, and *canning*.

3. *Nuts (pecans, walnuts, peanuts, etc.)*—Grading, cracking, shelling, cleaning, sorting, packing and storing, unshelled nuts; and performing the same operations except cracking and shelling, upon the nut meats.

4. *Sugar.*—*Manufacturing raw sugar*, cane, or maple syrup and molasses.

5. *Eggs.*—Handling, cooling, grading, and packing.

6. *Wool.*—Grading and packing.

7. *Dairy products.*—Salting, printing, wrapping, packing, and storing butter; ripening, molding, wrapping, packing, and storing cheese, and *canning or packing any other dairy product.*

8. *Cotton.*—Weighing, *ginning*, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.

9. *Nursery stock.*—Handling, wrapping, packaging, and grading.

10. *Tobacco.*—Handling, drying, bulking, stripping, tying, sorting, *stemming*, packing, and storing.

11. *Livestock.*—Handling and loading.

12. *Poultry.*—Culling, grading, cooping, and loading.

13. *Honey.*—Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.

14. *Fur.*—Removing the pelt, scraping, drying, putting on boards, and packing."

"Delivery to Storage (Performed by a Farmer)"

"(e) The term 'delivery to storage' includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to the places where they are to be stored or held pending preparation for or delivery to market."

"Delivery . . . to Market (Performed by a Farmer)"

"(d) The term 'delivery . . . to market' includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to market."

"Delivery . . . to Carriers for Transportation to Market (Performed by a Farmer)"

"(e) The term 'delivery . . . to carriers for transportation to market' includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, and poultry to a carrier—truck, railroad, ship, etc.—for transportation by such carrier to market."

"Other Practices (Performed by a Farmer)"

"(f) Besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption.

"The actual selling of the agricultural or horticultural commodities, etc., is such a practice. *The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt. If a company has sugarcane fields and also a mill, the transportation of its own sugarcane to the mill seems an incidental practice which is included in this term.*

"It must be emphasized with respect to all practices performed by a farmer, for which a claim is made that they are incident to or in conjunction with his farming operations, that they must be performed *only* on the agricultural or horticultural commodities, dairy products, livestock, bees, fur-bearing animals, or poultry produced or raised by him. The same limitation applies with respect to the practices discussed in paragraph 11, below."

"Practices . . . Performed . . . on a Farm"

"11. The term 'practices (including any forestry or lumbering operations) *performed . . . on a farm* as an incident to or in conjunction with' farming operations, involves substantially the same inquiries as those discussed in paragraph 10.

"It should be observed, however, that since these practices must be performed *on a farm*, one of the ac-

tivities listed in the statute, namely, delivery to market, cannot normally be one of the included practices, for that involves working off the farm. Hence, employees of independent contractors engaged in transporting to market agricultural or horticultural commodities, dairy products, poultry, livestock, bees or their honey, and fur-bearing animals or their pelts, would not be exempt. With that exception, practices described in paragraph 10, even if performed by employees of someone other than the farmer, are excluded from the wage and hour coverage of the act, so long as they are performed on the farm and 'as an incident to or in conjunction with such farming operations.'

"Thus, if an independent contractor threshes wheat on a farm, his employees are not subject to the wage and hour provisions of the act while they are so engaged on the farm where the wheat is grown. So, too, employees of an independent contractor who inspect and cull flocks of poultry on a farm are exempt while they are working on the farm where such poultry is raised. Similarly, employees erecting a silo on a farm are exempt while they are working on such farm."

"Office Workers, Etc."

"12. *We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in section 3(f). In our opinion such employees are exempt.*" [Emphasis supplied].

2. *Other Administrative Interpretations*

The Department in various opinion letters and releases has held the following to come within the agriculture exemption:

(a) Employees of an alfalfa grower, who haul the alfalfa grown by the grower to a processing plant located off the farm. *WHM* 35:754.

(b) The removal of stumps by employees of an independent contractor from cut over timber land owned by a

lumber company and now devoted by the lumber company to the growing of tung trees, where such removal and the plowing and fertilizing of the ground around the tung trees were necessary to the proper growth of the trees. *WHM* 35:751-752.

(c) Sorting, grading, sizing and other practices performed on tobacco by a tobacco company, if the company does this work on tobacco it grows itself or does it on the farm where such tobacco is grown. *WHM* 35:752-753.

(d) Work on the farm by field men of a cannery to which the farmer had contracted to sell his crops, notwithstanding such field men from time to time report to the canning plant. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.203.

(e) Pre-cooling operations on the farm with respect to fruits and vegetables grown on the farm. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.21.

(f) Logging operations performed by the farmer or on his farm with respect to timber blown down in a hurricane. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.252.

(g) Vining of peas grown on a farm by a vinery located thereon. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.281.

(h) Tobacco stemming by a farmer or on a farm. 3 *C. C. H. Labor Law Reporter* ¶ 25,242.344.

APPENDIX D.

Text of Section 7(c) and Department of Labor's Interpretations.

1. *Text of Sec. 7(c).*

Section 7(c) read as follows during the period involved in this action (1946-1947):

> "In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

2. *Paragraph 18 of Interpretative Bulletin No. 14.*

> ". . . The term 'raw sugar' describes the product of the first processing of sugar cane, which product normally is thereafter refined before it is consumed. The processing of sugar cane into raw sugar is within the exemption; . . ." ¶ 18, *WHM* 35:358.

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3. *Interpretations as to which employees of a processor are exempt under Section 7(c).*

> "When an establishment is *exclusively* engaged in performing operations specifically mentioned in Sec. 7(c), every employee working in such a plant either will be actually engaged in the described operations,

or else will be engaged in an occupation which is a necessary incident to the described operations and working solely in a portion of the premises devoted by his employer to such operations. [Emphasis supplied] *WHM* 35:551

* * * * * * * * * *

"At present, if an establishment is engaged exclusively in the operations exempted under section 7(c), generally speaking all employees employed in that establishment are exempt from the overtime provisions of the act for either the entire year or 14 weeks a year, depending on the particular activities involved. This includes office, custodial and maintenance employees." *Statement of Secretary of Labor Schwellenbach* submitted to Senate Committee on Labor and Public Welfare, Hearings on S. 2386 and other bills, 80th Cong., 2nd Sess., p. 183.

* * * * * * * * * *

An Opinion of the Department of Labor, dated March 18, 1941, held that the Sec. 7(c) exemption applied to field men employed by canneries to supervise the production and harvesting of raw products purchased under acreage contracts. These men, like the employees hauling cane to the mill in the instant case, spend most of their time in the fields but they make the cannery their headquarters and make regularly recurring trips to and from the cannery. The Department held that they should be considered as working in the "place of employment". 3 *C. C. H. Labor Law Reporter*, ¶ 25,250.255.

APPENDIX E.

Department of Labor's Allowance of Tolerance of Non-Exempt Work in the Case of Most Exemption Provisions in the Act.

In the case of the following exemptions, the Department of Labor has allowed the indicated percentage of non-exempt work in a workweek without loss of the exemption:

Sec. 13(a)(1) exemption for executives, administrative employees, professionals, local retailing capacity employees and outside salesmen—20%.[1]

Sec. 13(a)(2) exemption for retail establishments—25%.[2]

Sec. 13(a)(3) [now Sec. 13(a)(14)] exemption for seamen—20%.[3]

Sec. 13(a)(4) [now Sec. 13(b)(3)] exemption for carriers by air—20%.[4]

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[1] Regulations, Pt. 541, Subpart A, Title 29, Ch. V, Code of Fed. Reg. (14 F. R. 7705) §§ 541.1(e), 541.2(d), 541.3(d), 541.4(b) and 541.5(b); 3 C. C. H. Labor Law Reporter ¶¶ 23,301.01(e), 23,301.02(d), 23,301.03(d), 23,301.04(b), 23,301.05(b); WHM 20:3 to 20:5. See *Knight* v. *Mantel*, 135 F. (2d) 514, 517-518 (C. C. A. 8), *Bender* v. *Crucible Steel*, 71 F. Supp. 420, 425 (W. D. Pa. 1947), both of which applied the 20% test. See also *Walling* v. *General Industries*, 330 U. S. 545, 547; *Atkinson Co.* v. *Lassiter*, 162 F. (2d) 774, 777 (C. C. A. 9), judgment vacated on other grounds, 166 F. (2d) 144; and *Helliwell* v. *Haberman*, 140 F. (2d) 833, 834 (C. C. A. 2) which seem to approve the 20% test.

[2] As explained, *supra*, p. 83, note 52, the 1949 amendments specifically wrote the 25% test into the law for retail establishments. The tolerance referred to in the text was that permitted by the Department prior to such amendments.

[3] Title 29, Ch. V, Code of Fed. Reg., Pt. 783 (13 F. R. 1376, 14 F. R. 3678), § 783.4; 3 C. C. H. Labor Law Reporter ¶ 24,109.50; WHM 15:547.

[4] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart A (13 F. R. 1376) § 786.1; 3 C. C. H. Labor Law Reporter ¶ 24,112.01; WHM 15:15.

Sec. 13(a)(5) fishery exemption—20%.[5]

Sec. 13(a)(8) exemption for local newspapers—49.999%.[6]

Sec. 13(a)(9) exemption for street, suburban, etc., railways and local trolley and motor bus operators—20%.[7]

Sec. 13(a)(11) exemption for switchboard operators—20%.[8]

Sec. 13(a)(12) exemption for taxicab operators—20%.[9]

Sec. 13(a)(15) exemption for forestry or logging operations in which not more than 12 employees are employed—20%.[10]

Sec. 13(b)(2) exemption for employees of employers subject to Part I of the Interstate Commerce Act—20%.[11]

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[5] Title 29, Ch. V, Code of Fed. Reg., Pt. 784 (13 F. R. 1376) § 784.1; 3 C. C. H. Labor Law Reporter ¶ 24,110.01; WHM 15:82.

[6] 3 C. C. H. Labor Law Reporter ¶¶ 25,260.05 and 25,260.34; WHM 15:313. The 49.999% test was also applied in *Robinson* v. *North Arkansas Printing Co.*, 71 F. Supp. 921, 923 (W. D. Ark).

[7] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart B (13 F. R. 1376) § 786.50; 3 C. C. H. Labor Law Reporter ¶ 24,112.50; WHM 15:147.

[8] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart C (13 F. R. 1376) § 786.100; 3 C. C. H. Labor Law Reporter ¶ 24,112.100; WHM 15:687.

[9] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart E (19 F. R. 430) § 786.2; 3 C. C. H. Labor Law Reporter ¶ 24,112.2; WHM 15:645.

[10] Title 29, Ch. V, Code of Fed. Reg., Pt. 788, § 788.7; 3 C. C. H. Labor Law Reporter ¶ 24,114.07; WHM 15:110.

[11] Title 29, Ch. V, Code of Fed Reg., Pt. 786, Subpart D (13 F. R. 1376) § 786.150; 3 C. C. H. Labor Law Reporter ¶ 24,112.150; WHM 15:345.